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No. 76-1585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD HENSON AND HENSON AVIATION, INC.,
Petitioners,

v.

T. S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Richard Henson and Henson Aviation, Inc. hereby respectfully petition for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on February 22, 1977.

OPINIONS BELOW

The opinion of the District Court and its findings of fact (Appendix A, *infra*) are reported at 392 F. Supp. 813 (D. Md. 1975). The first opinion of the Court of Appeals (Appendix B, *infra*) is reported at 538 F.2d 85 (4 Cir. 1976); said opinion was withdrawn in part

and the substituted opinion (Appendix C, *infra*) has not yet been officially reported. Finally, an Order was entered April 5, 1977 (Appendix D, *infra*) making further changes in said opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in failing to apply the "manifest injustice" exception adopted in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) where the trial court expressly found that the subject private antitrust action was brought solely in quest of an attorney's fee?

2. When a circuit court has decided a case, published its opinion, and entered its judgment under Rule 36, Fed. R. App. P., has it then "render[ed] its decision" within the meaning of the rule in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974) so as to divest it of jurisdiction to reopen the case after certiorari has been denied by this Court and retroactively apply a new statute?

3. Did the Circuit Court of Appeals err in giving retroactive application to Public Law 94-435, known as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976", by directing the award of an attorney's fee in a case where the plaintiff did not "substantially prevail"?

4. Whether the Circuit Court of Appeals failed to comply with the mandatory provisions of the Federal Rules of Appellate Procedure?

STATUTE INVOLVED

The Clayton Act, Section 16 (15 U.S.C. 26) provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 U.S.C. §§ 13, 14, 18 and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . ."

to which section the enactment, on September 30, 1976, of Public Law 94-435, known as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976", added the following language at the end of Section 16:

> "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

STATEMENT OF THE CASE

Since 1931 Petitioners, Richard Henson and Henson Aviation, Inc., ("Henson") have been operating a flying service at the Hagerstown Municipal Airport, ultimately formalized by a written lease executed with the City in 1948.

Following a public meeting held by the City Council on February 14, 1972, to discuss the proposed contracts, which meeting was attended by Alphin and his then counsel, neither of whom raised objection, the City leased a portion of the airport to Henson for use as a

fixed base operation, and designated Henson, Inc. as Airport Manager, an arrangement the district court found "... did not grant Henson or HInc. any exclusive right to furnish fbo services on the airport" [Conclusion 2, App. A., *infra,* p. 25a] and " . . . is not a monopoly which is unlawful under the antitrust laws, . . . " [Conclusion 1, App. A., *infra,* p. 25a].

On December 26, 1972, Alphin, through his present counsel, wrote the Mayor applying for a lease of space and grant of privileges to conduct a fixed base operation at the airport, which letter "... erroneously stated that there was 'a heavy demand for additional services and facilities on the airport' " [Finding 36, App. A., *infra,* p. 17a], and which letter "was principally intended to help establish a claim for violation of the antitrust laws" [Finding 41, App. A., *infra,* p. 18a], and further as to which "The Court finds on all evidence that the City was and is justified in not accepting the proposal contained in Beckman's letter of December 26, 1972, . . ." [Finding 43, App. A., *infra,* p. 18a].

On May 4, 1973, Alphin filed several claims in this action under the antitrust laws, 15 U.S.C. §§ 2, 15 and 26. After an extended trial, the district court found in favor of Henson on (1) the monopoly issue; (2) the conspiracy issue; (3) the issue of damages; and (4) denied all injunctive relief prayed for [Alphin wanted both contracts set aside] except for a "narrow" injunction enjoining the City and Henson from designating Henson as the conduit for lease proposals submitted to the City.

As to the application for an award of counsel fees, which now remains as the sole issue on appeal, the

district court concluded that "... not only the denial of the claim for damages, but also the narrowness of the injunction which will be issued and the findings with respect to the negotiations and correspondence before the filing of the action (see particularly Findings 33-37, inclusive) justify, if they do not require, the denial of an attorney's fee to Alphin as part of his costs." [Conclusion 12, App. A., *infra,* p. 32a].

Alphin appealed to the Fourth Circuit, and on May 17, 1976, that court, applying the holding in *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), published a *per curiam* opinion affirming the trial court, in which opinion the Fourth Circuit observed, and affirmed, that "The district court * * * concluded that the plaintiffs had failed to prove that they had suffered any injury as a result of Henson's conduct and declined to award damages under Section 4 of the Act." [App. B., *infra,* p. 40a]. Judgment was entered as provided in Rule 36, Fed. R. App. P., that same day. [App. E., *infra,* p. 48a].

Alphin then filed a Petition for Writ of Certiorari in this Court on August 16, 1976; and on October 28, 1976, Alphin filed a Supplement to that Petition in which it not only invited this Court's attention to the enactment on September 30, 1976 of Public Law 94-435, *supra,* but also set forth its pertinent legislative history. With knowledge of the existence of the new legislation and its legislative history before it, and despite the asserted applicability to the case at bar, this Court, on November 15, 1976, denied the Petition.[1]

---

[1] No. 76-229, October Term, 1976.

Although Rule 41(b), Fed. R. App. P., provides that "Upon the filing of a copy of an order of the Supreme Court denying the petition for writ or certiorari the mandate shall issue immediately", the Fourth Circuit, with knowledge that this Court had denied certiorari [App. F., *infra*, p. 49a], failed to issue its mandate and instead issued a further stay of its mandate, and accepted from Alphin a motion for leave to file a second petition for rehearing. In a split decision accompanied by a strong dissent, the Fourth Circuit proceeded to reverse itself, granted leave to file the second petition for rehearing, granted the petition, withdrew its prior opinion affirming the denial of attorneys' fees, reversed the district court, and remanded the case ". . . with directions to grant appropriate attorneys' fees in accordance with the 1976 Act." [App. C., *infra*, p. 45a]. That second opinion not only misstated a critical finding by the district court, but also expressly contradicted its earlier published opinion which had recognized the district court's finding that Alphin had produced no evidence of injury. [App. C., *infra*, p. 43a].

Henson thereupon filed a petition for rehearing *in banc* which, although it was denied, evoked a third and even more puzzling contradictory opinion [App. D., *infra*, p. 47a] in which the Fourth Circuit "ORDERED that the last sentence beginning on page 7 of the text of the slip opinion be stricken . . .". The sentence thus struck read:

> "We therefore grant leave to file the second petition for rehearing; we grant the petition for rehearing; and we withdraw the portion of our prior opinion affirming the denial of attorneys' fees."

Candor compels the acknowledgement that the referenced matter and the aberrant result produced is obviously the product of a typographical, or some other, error, but nevertheless here the record stands. It would appear, however, that, as the record now stands, the Fourth Circuit has unintentionally emasculated its *ex post facto* reversal and remand.

REASONS FOR GRANTING THE WRIT

1. This case presents a novel and important question of federal law which has not been but should be decided by this Court. The issue was resolved by the court below incompatibly with settled principles of appellate review and is in direct conflict with decisions rendered by this Court which provide established guidelines for the retroactive application of new federal legislation.

The issue presented is multifaceted. It is concerned with both the propriety of, and the procedural requisites for, the retroactive application of a new statute providing for the first time for the award of attorney's fees in private antitrust cases brought under Section 16 of The Clayton Act (15 U.S.C. 26).

Putting aside for the moment the question called into play by this statute, i.e., which party "substantially prevailed," the legislation in question creates another statutory exception to the "American Rule" that even the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. *Alyeska Pipeline, supra.* (421 U.S. at 247).

The legislation in question was enacted as Public Law 94-435, known as the "Hart-Scott-Rodino Anti-

trust Improvements Act of 1976" which, *inter alia,* added to the language of 15 U.S.C. § 26 the following:

> In any action under this section in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such plaintiff.

The Act was signed by the President on September 30, 1976, and the quoted language became effective on that date, while this case was then pending before this Court on a petition for writ of certiorari. With knowledge of the enactment of the new legislation and with its legislative history before it [2] this Court nevertheless denied the writ, prompting Senior Circuit Judge Field to observe, in a strong dissent: [3]

> ". . . it occurs to me that the Supreme Court would have been as perceptive as we in discerning any effect of the Amendment on this case. In my opinion the majority has intruded upon the legislative area in giving the Amendment retroactive effect."

As this Court said in *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913), "the first rule of construction is that legislation must be considered as addressed to the future, not to the past * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * * * * unless such be 'the unequivocal and inflexible im-

[2] By Supplemental Petition filed by Alphin on October 23, 1976; see Statement of Facts, *supra.*

[3] App. C, *infra*, p. 46a.

port of the terms, and the manifest intention of the legislature.' " [4]

In *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 416 (1940), this Court held that when a statute was amended after a petition had been filed for certiorari and while that case was still pending before this Court, "the amended statute is applicable to this proceeding." But, just as it was necessary for this Court to consider *Bradley* v. *Richmond School Board,* 419 U.S. 696 (1974) to "decide today a question left open in *Northcross,*[5] namely 'whether § 718 authorizes an award of attorneys' fees insofar as those expenses were incurred prior to the date that that section came into effect' ", so too is it desirable that this Court now consider the instant Petition to decide a question left open in *Carpenter, supra;* namely, whether a Court of Appeals may reopen a case *after* it has been decided and become a finality in that court *prior* to the effective date of an amendment to the controlling statute.

The retroactive application of this legislation to the instant case is a dangerous precedent for any one of a number of reasons.

[4] See, e.g., *Claridge Apartments Co.* v. *Commissioner,* 323 U.S. 141, 164; *Greene* v. *United States,* 374 U.S. 149, 160; Smead, "The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775-781 (1936).

[5] *Northcross* v. *Board of Education of the Memphis City Schools,* 412 U.S. 427, 37 L. Ed. 2d 48, 93 S. Ct. 2201 (1973).

A. To Award Attorney's Fees in the Instant Case Would Subvert This Court's Admonition To Avoid Doing "Manifest Injustice".

The Fourth Circuit relied upon this Court's recent opinion in *Bradley* v. *Richmond School Board, supra,* in awarding the attorney's fees in question. Assuming *arguendo,* that the Fourth Circuit had not yet made a final decision in the instant case, and properly had discretion to change its earlier opinion denying attorney's fees, it was inappropriate to award attorney's fees when to do so would clearly result in "manifest injustice" to Petitioner (Henson).

At the heart of this Court's decision in *Bradley, supra,* was the earlier landmark case of *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801) in which Mr. Chief Justice Marshall drew an important distinction in writing for the Court that:

> "It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, . . ." *Id.,* at 110

It goes without saying that neither *Schooner Peggy, supra,* nor the Court's decision in *Bradley, supra,* "purport[s] to hold that courts must always . . . apply new laws to pending cases in the absence of clear legislative direction to the contrary . . ." *Bradley, supra,* at 715.

Thus an important exception to such retroactive application of legislation has been recognized "to prevent manifest injustice". *Bradley, supra,* at 716, citing *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268 (1969). This Court first recognized

this exception in *Greene* v. *United States,* 376 U.S. 149, 160 (1964), where it relied upon the "first rule of [statutory] construction . . . that legislation must be considered as addressed to the future not to the past . . ." so as not to deny to a government employee the right to recover monetary restitution from the government even though that right had been abridged by new legislation enacted while that case was still pending.

In *Bradey, supra,* this Court was careful to denote why the "manifest injustice" exception did not there apply:

> "Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in *Schooner Peggy* suggested that such injustice could result 'in mere private cases between individuals,' and implored the courts to 'struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.' 1 Cranch, at 110, 2 L.Ed. 49. We perceive no such threat of manifest injustice present in this case. We decline, accordingly, to categorize it as an exception to *Thorpe's* general rule.
>
> The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon these rights." [at p. 717]

Applying these three (3) criteria to the facts of the instant case, we first examine the nature of the parties. In contrast with *Bradley, supra,* which pitted a class action of parents and guardians against a defiant public school board, in the case at bar we are dealing with private parties: Alphin, an independent businessman [who incorporated after the litigation commenced]

engaged in aircraft rebuilding *versus* Henson and his small, closely-held corporation engaged in operating a fixed base operation at a small airport in Hagerstown, Maryland. Thus, unlike *Bradley*, this is the type of "mere private case" to which Mr. Chief Justice Marshall was explicitly referring in *Schooner Peggy, supra.*

Secondly, we look to the nature of the rights affected by the change. There was no "right" to attorney's fees vested in Alphin prior to the new legislation in question. Accordingly, we are not dealing with a situation where a litigant was proceeding upon the belief that he was entitled to attorney's fees as a matter of right only to suddenly have the tables turned on him. To refuse to apply the legislation retroactively in the instant case would do nothing more than leave the parties *status quo ante bellum.*

Finally, and perhaps most importantly, we must look to the nature of the impact of the change in law upon existing rights. There was no prior "right" to recover attorney's fees in Section 16 injunctive relief proceedings until the enactment of the new legislation in question, a fact patently taken into account by the district judge who, as is obvious from the tenor of his opinion, would not otherwise have granted the "narrow" injunctive relief against Henson and the City had it carried the onus of an "unjustified" fee award. To retroactively confer such a "right" would not only constitute a "manifest injustice" to Henson, who has had no opportunity to be heard on this isssue, but would be the height of irony as well. The legislative history of the new statute awarding counsel fees shows that this mandatory award stems from the "private attorney general" theory whereby private parties are encouraged to vindicate public policy in enforcing the antitrust laws. [See The Senate Judiciary Committee Report on the Senate Bill, S. Rep. No. 94-803, 94th Cong. 2nd Sess., 38 (1976) appendix.]

How ironic it is that Alphin, whom the trial court chastised for his unseemly motives in spawning litigaton primarily for the purpose of seeking counsel fees, rather than to vindicate public policy, is now to be rewarded for his debasement of the antitrust laws. Surely such a result is not only a "manifest injustice" to Henson, but a dangerous precedent for others who would seek to pervert the lofty principles embodied within the antitrust laws by setting out on a quest for counsel fees rather than for justice.

B. The Fourth Circuit Court of Appeals, Having "Rendered a Decision "Denying Attorney's Fees, Was Precluded from Retroactively Applying New Legislation To Reverse Its Earlier Opinion Both by Applicable Case Law as Well as by the Federal Rules of Appellate Procedure.

Aside and apart from the manifest injustice of awarding attorney's fees in the instant case, it seems clear that the Fourth Circuit Court of Appeals was without authority to reverse its earlier opinion denying the said fees. All of the cases which discuss the propriety of retroactively applying legislation specify that this can only occur ". . . before the decision of the appellate court . . ." *Schooner Peggy, supra,* at 108; *See also, Bradley, supra.*

In the instant case, however, the Fourth Circuit had not only published its decision denying attorney's fees four months before the subject legislation was enacted, but Alphin had filed a Petition for Writ of Certiorari

with this Court which was ultimately denied. It was only after Alphin filed a Motion for Leave to File a Second Petition for Rehearing following denial of certiorari, that the Fourth Circuit withdrew and reversed its earler opinion and filed a new opinion retroactively applying the legislation in question.

This action by the Fourth Circuit not only went against the grain of the precedents established by this Court, but also was contrary to the plain language of the Federal Rules of Appellate Procedure which required that a mandate issue well before the Fourth Circuit reopened the proceedings and withdrew its earlier opinion, prompting Judge Field to observe in his dissent that:

> "In *Bradley* the statute had become effective while the case was pending in this court and had not yet been decided. In the present case, however, the case had been decided by us and had become a finality in this court over four months prior to the effective date of the Amendment." [App. C, *infra*, p. 46a]

Rule 41, Fed. R. App. P. reads in pertinent part:

> "(b) STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. *The stay shall not exceed 30 days* unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately." (emphasis added)

In the instant case, a Motion for Stay of Mandate, explicitly requesting a 30-day stay, was filed on June 21, 1976. According to Rule 41 the mandate should have issued thirty days later unless "extended for cause shown" or unless notice was received by the Fourth Circuit from the Clerk of the Supreme Court that a Petition for Certiorari had been filed within that time frame. Neither event came to pass so as to toll the thirty day period for there was no motion ever filed to extend the stay and the Petition for Certiorari was not filed until August 16, 1976. Accordingly, there was no justification for the circuit court to withhold its mandate after July 22, 1976. Neither was there any justification for that court's failure to issue its mandate on November 19, 1976, the day it was expressly notified by Alphin in his Second Petition for Rehearing that this Court had denied certiorari. [App. F., *infra*, p. 49a]. The clear and unambiguous language of Rule 41(b) has thus twice been ignored by the Fourth Circuit.

It is respectfully submitted that the decision below, rendered in abrogation of both the letter and the spirit of the Federal Rules of Appellate Procedure, is such a departure from the accepted course of judicial proceedings as to constitute a real threat to the integrity of the appellate process.

This Court stands as the last bastion for those who seek to preserve the integrity of the judicial process in the federal appellate courts. There can be no better opportunity than that presented by this case to under-

score that the Federal Rules of Appellate Procedure are obligatory and must be literally followed in order to preserve the public trust and confidence in the judicial system.

2. The decision below raises issues of major national importance in providing the first application of a mandatory award of attorney's fees under the "Hart-Scott-Rodino Antitrust Improvements Act of 1976".

The case at bar does not present ". . . a situation where the propriety of a fee award was pending resolution on appeal when the statute became law", as in *Northcross, supra;* nor does it concern "a nondiscriminatory public school system", characterized by "complex issues pressed on behalf of large classes" or "obstinate noncompliance with the law", as in *Bradley, supra.* It is, rather, one of those "mere private cases between individuals" to which Mr. Chief Justice Marshall referred in *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed 49 (1801), [and quoted with approval in *Bradley, supra*] as to which ". . . a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." 416 U.S. at 712. The case at bar does not concern a situation in which it has been determined that the law was wrong as previously applied; we are concerned instead merely with a newly created benefit for the private antitrust litigant who "substantially prevails". But the Fourth Circuit completely ignored the clear legislative mandate that this new statutory right was being extended only to those plaintiffs who "substantially prevail". It is respectfully urged that this Court should speak to the issue of the application of this limitation before other courts mistakenly follow the lead of the Fourth Circuit.

C. Assuming Retroactivity Is Appropriate, the New Legislation Is Applicable Only to Those Cases in Which the Plaintiff "Substantially Prevails"

The amendment added to Section 16 by the enactment of Public Law 94-435 provides that the award of "a reasonable attorney's fee" shall be made only in those actions ". . . in which the plaintiff *substantially prevails,* . . ." (emphasis added). The Court of Appeals completely ignored this qualifying language in its preoccupation with the issue of retroactivity. It made no finding as to which party substantially prevailed. There was no transcript furnished by Alphin and the circuit court's review was therefore necessarily limited to the Findings of Fact and Conclusions of Law made by the district court. The obligatory standard of review, i.e., whether the district court was "clearly erroneous" in its factual findings, was ignored.

Since the new legislation [Public Law 94-435, *supra*] was not in existence when the district court made its findings and conclusions, there was no apparent need for it to address specifically the issue of which party "substantially prevailed", but the answer to that determination is implicit in the whole of its opinion, and expressly self-evident in Conclusion 12 [App. A, *infra,* p. a] which reads, in pertinent part:

> ". . . not only the denial of the claim for damages, but also the narrowness of the injunction which will be issued and the findings with respect to the negotiations and correspondence before the filing of the action (see particularly Findings 33-37, inclusive) *justify,* if they do not require, the denial of an attorney's fee to Alphin as part of his costs" (emphasis added)

In short, the district court found explicitly, based upon the whole record, that the narrow scope of inci-

dental relief granted not only justified, but required the denial of an attorney's fee. The Court of Appeals had nothing before it upon which to conclude, or assume, that plaintiff had "substantially prevailed" below. As this Court said in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 436 (1975):

> "... it appears that the more prudent course is to leave to the District Court the precise fashioning of the necessary relief in the first instance."

Or, as stated by Mr. Chief Justice Burger in his concurring opinion (at page 453):

> "At the very least, the case should be remanded to the Court of Appeals with instructions that it reconsider the ... issue [here it would be as to which party "substantially prevailed"], giving the District Court's findings of fact the deference to which they are entitled."

and thereupon, as the majority opinion points out, that issue

> "... will be open to review by the Court of Appeals, if the District Court, on remand, decides again to decline to make an award of [attorney's fees]. But the standard of review will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case, Langnes v. Green, 282 U.S. 531, 541, 75 L.Ed 520, 51 S.Ct. 243 (1931)." at page 424-425.

Although the Court of Appeals expressly bottomed it substituted opinion upon *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), it overlooked the

fact that this Court properly remanded that case to the district court so that the district court "... in its discretion may allow the petitioners a reasonable attorneys' fee. ..." (at page 724).

Given the fact that the new legislation does not say "any relief", but rather limits the fee award to a party who "substantially prevails", it is certainly reasonable for a litigant who finds himself caught in the sudden turnabout of retrospective application to expect that the circuit court will give reasoned consideration to that explicit limitation and at least remand to the district court for the purpose of an express finding on that material issue.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 12, 1977

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL No. 73-449-T

T. S. ALPHIN and ALPHIN AIRCRAFT, INC.

v.

RICHARD HENSON and HENSON AVIATION, INC.

and

CITY OF HAGERSTOWN, MARYLAND

(FILED: MARCH 14, 1975.)

Robert M. Beckman, Frank K. Smith, of Washington, D.C., and Norman I. Broadwater, of Hagerstown, Maryland, for plaintiffs.

George J. Goldsborough, Jr., and Broughton M. Earnest, of Easton, Maryland, for defendants Henson and Henson Aviation, Inc.

Robert E. Kuczynski, City Attorney, Daniel W. Moylan and William P. Nairn, of Hagerstown, Maryland, for defendant City of Hagerstown.

Thomsen, District Judge

The several claims in the action under the antitrust laws, 15 U.S.C. 2, 15 and 26, originally brought by T. S. Alphin, d/b/a Alphin Aircraft (Alphin), against Richard Henson (Henson), and Henson Aviation, Inc. (HInc.), deal with the furnishing of aviation supplies and services on the Hagerstown Regional Airport, formerly called the Hagerstown Municipal Airport (the airport). By subsequent pleadings Alphin has added the City of Hagerstown as a defendant and Alphin, Inc. (AInc.) as a plaintiff, and has

added a pendent jurisdiction claim. Henson and HInc. have filed a counterclaim against Alphin and a cross claim against the City.[1]

The following facts are found from the evidence admitted at the trial and inferences drawn therefrom, giving consideration to the credibility of the several witnesses.

Findings of Fact

1. Hagerstown is the county seat of Washington County, in the narrow part of Western Maryland, where the Potomac River runs close to the Mason-Dixon line. The population of the City itself has been relatively static, 31,000 in 1930 and 36,000 in 1970. The "Hagerstown area", however, which runs into both Pennsylvania and West Virginia, has about 100,000 persons. The airport is some five miles north of the City and one mile south of the Mason-Dixon line.

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[1] The original complaint was filed on May 4, 1973, by Alphin against Henson and HInc. In February 1974 an amended complaint was filed, adding the City as a defendant, and adding a pendent jurisdiction claim based on Art. 1A, § 13(e) of the Annotated Code of Maryland, now Art. 1A, § 7-701(e). The original defendants then filed a cross-claim against the City for indemnity or contribution. A second amended complaint was filed on May 23, 1974, elaborating the pendent claim against the City. Alphin incorporated his business on April 1, 1974, and on July 12, 1974, the Court authorized that corporation to be added as a party plaintiff.

After elaborate discovery, the case came on for trial before the Court without a jury on January 6, 1975. At the conclusion of plaintiffs' case, the several defendants moved for judgment under Rule 41(b), F. R. Civ. P. The Court ruled that plaintiffs had failed to prove that they were entitled to recover any damages from any of the defendants; but the Court denied defendants' motions for judgment with respect to the injunctive relief sought by plaintiffs. Henson and HInc. then dismissed their cross claim against the City. The findings of fact and conclusions of law set out herein deal with plaintiffs' pendent claim, as well as their claims under the antitrust laws, and with the counterclaim against Alphin filed by defendants Henson and HInc.

The Airport

2. In 1930 defendant Henson was employed as a test-pilot by Kreider-Reisner Aircraft Co., Inc., a manufacturer of aircraft and aircraft parts, now part of Fairchild Industries (Fairchild). In 1930 Henson "opened" a 40-acre airport on land then owned by Fairchild.

3. In 1934 the City purchased the airport from Fairchild. For some years the business of Fairchild expanded, but in more recent years it has declined. Over the years Fairchild has cooperated with the City by selling to it some parcels of land adjacent to the airport. Other land has been acquired by the City, and the airport has grown to 360 acres.

4. A plan of the airport and adjacent properties as they now exist is attached to this opinion as Exhibit A. The instrument runway runs east and west; the non-instrument runway runs roughly north and south. Exhibit A is based upon a preliminary layout plan which has been prepared by consulting engineers employed by the City in March 1973, whose final report is expected early in the present year. Exhibit A also shows some of the land which the engineers propose should be added to the airport, and which the City has the power to condemn under Art. 1A, § 7-701, Anno. Code of Md., Vol. 1, 1974 Cum. Supp.[2]

Henson's Activities Through 1971

5. In 1931, while he was still employed by Fairchild, Henson began to operate a flying service at the airport. At that time, and in 1934, when the City bought the airport property from Fairchild, the only hangar at the airport was an old wooden hangar built in the 1920's, which Henson had leased from Fairchild, but which has since been torn down.

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[2] Formerly Art. 1A, § 13. See *Friendship Cemetery* v. *City of Baltimore*, 197 Md. 610, 81 A.2d 57 (1951).

6. In 1936 the City built a hangar (no. 1 on the plan) and leased it to Henson. It is now being used as the airport terminal.

7. Henson's activities on the airport, most of which have been carried on through HInc.,[3] expanded over the years, although Henson also continued to work for Fairchild until 1964, when he began to devote his full time to his airport interests. For some time before as well as after 1964 Henson and HInc. had a fixed base operation (fbo) [4] on the airport. They provide line service (sale of fuel, oil and lubricants),[5] flight training, ground school training, aircraft rental, tie down service, aircraft parking, aircraft repair and maintenance, avionics, a small amount of aircraft sales, air taxi and charter services, and a commuter service operated in connection with Allegheny Airlines.[6]

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[3] In the 1950's Henson formed a corporation to conduct his operations on the airport. That corporation, which is the corporate denfendant herein, first called Henson, Inc., and later Henson Aviation, Inc., will be referred to herein as HInc. In 1971, Henson and the Magazine brothers formed a holding company, in which Henson has a 45% interest, which acquired all the stock of HInc. The holding company also operates the Friendship Flying Service at the Baltimore-Washington International Airport.

[4] "A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. It is vital to air transportation." *E. W. Wiggins Airways, Inc* v. *Massachusetts Port Auth.*, 362 F.2d 52, 53 n.2 (1 Cir. 1966). The evidence in the instant case supports that definition, although what is encompassd in an fbo has changed somewhat over the years.

[5] Henson and HInc. have used trucks to carry fuel to the aircraft. In some airports of comparable size the aircraft go to the pumps.

[6] All the operations of Henson and HInc. have been conducted on the airport except the carrier operation, which has an office on the airport, but also serves four other cities.

8. By a lease executed in 1948, modified in 1949, the City leased the airport to Henson. In 1952 a new lease for a period of three years was executed, this time to HInc., wherein, for a rental of $2,000 a year, HInc. was given the right to control all selling privileges and concession rights on the airport and in the City hangar, subject to various provisions.[7] The lease specifically provided: that it should not be construed as granting HInc. any exclusive right to conduct any activity at the airport involving the use of landing area contrary to Section 303 of the Civil Aeronautics Act of 1938; and that the lease "shall be subordinate to the provisions of any existing or future agreement between the City and the United States, relative to the operation or maintenance of the airport, the execution of which has been or may be required as a condition precedent to the expenditure of Federal funds for the development of the airport". After the expiration of the lease, HInc. held over as a tenant, at rentals increased from time to time, until a new lease was executed in 1972. Until 1972 no one else asked the City officials for a lease of the airport or any part thereof, or complained to the City of the terms of the arrangement with Henson or HInc.

9. In 1954, HInc., the Landis Tool Company and the City worked out an unusual arrangement whereby Landis

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[7] HInc. agreed during the term of the lease: to furnish good, prompt and efficient service adequate to meet all demands for its service at the airport; to furnish such service on a fair, equal and nondiscriminatory basis to all users; and to charge fair, reasonable and nondiscriminatory prices for each unit of sale or service, subject to the right to make reasonable and nondiscriminatory discounts, rebates or price reductions to volume purchasers. Henson allowed substantial discounts to Alphin for material purchased by Alphin from HInc. over the years.

The lease also prohibited the granting of concessions which (a) would extend beyond the term of the lease, or (b) were not reasonably necessary in the operation of the airport, or (c) were not in accord with the usual standards of good airport mangement.

built a hangar (no. 2 on the plan) on the airport, conveyed its interest in the hangar to HInc. and leased it back, with a provision that the City might purchase the hangar at any time at its depreciated value, in which event HInc. would make a specified adjustment with Landis. The arrangement was satisfactory to all three parties and was repeated in 1961-2, when Landis built a larger hangar (no. 3 on the plan) and terminated its lease of the smaller hangar, which became the avionics building.

10. In 1959 Henson built a T-hangar (no. 4 on the plan) on airport land leased by the City to Henson, who borrowed the money to build the hangar. Henson agreed to pay the City rent based on his receipts from its use. In 1961 Henson purchased from Fairchild a plot of land just west of the first T-hangar, and over a period of several years built four more T-hangars thereon (Nos. 5, 6, 7 and 8 on the plan). In 1971, those hangars and the land on which they were built were deeded to the City, along with Henson's interest in other hangars on City land.

11. Henson acted as airport manager, with the knowledge and approval of the City officials, in dealings with the Federal Aviation Administration and with other persons and corporations, although no written agreement formally designating an "airport manager" was signed until May 1972, when HInc. (the corporate defendant) was so designated.

12. It is the usual practice, in Maryland and elsewhere, for cities of the size of Hagerstown or somewhat larger, to have the fixed base operator act as airport manager; the evidence does not show, however, that it is the general practice for such fixed base operator to negotiate on behalf of the City with potential competitors.

13. The agreement between Henson and the Magazine brothers (see n. 3, above), under which a holding company, in which Henson has a 45% interest, acquired all of the stock of HInc., became effective in April 1971.

FAA

14. Since the City obtains financial assistance from the federal government for the airport, the Federal Aviation Administration (FAA) has the responsibility to see that applicable federal laws and regulations are complied with, including the preservation of minimum standards and the policy against the granting of exclusive rights at an airport. Representatives of FAA visited the airport from time to time, and the Regional Office of FAA was familiar with the arrangements between Henson and the City. Over the years FAA has dealt with Henson as the representative of the City on the airport and has not found that the relationship of Henson with the City, nor the operations which Henson and HInc. conducted on the airport, violated the "non-exclusivity" provisions of any applicable law or policy. The relevant laws and policies which FAA is charged with enforcing are set out in Exhibit B, at the end of this opinion.[8]

ALPHIN'S ACTIVITIES THROUGH 1971

15. Alphin is a capable aircraft mechanic. He worked for the Government from 1942-1946, then moved to Hagerstown to work for Fairchild. Shortly thereafter Henson employed Alphin to do maintenance and repair work for Henson on the airport and to be manager of that part of Henson's business.

16. In 1948 that work dropped off; Alphin wished to do aviation maintenance and repair work on his own, and Henson was glad to turn over his repair work to Alphin, with the understanding that Alphin would give it prompt attention. Accordingly, Henson subleased to Alphin the old wooden hangar which Henson had leased from Fairchild.

17. In late 1952 Henson's lease of the wooden hangar terminated, and Fairchild reoccupied it. Alphin would

[8] FAA is not charged with the enforcement of the antitrust laws.

have liked to build a shop on the airport, but Henson told him there was no space available at that time. Alphin did not take the matter up with any City official, but arranged with Henson to do part of his (Alphin's) maintenance and repair work in the City hangar (then the only hangar on the airport except the wooden hangar) and to store his materials there. He moved some of his tools and equipment to his home, where he did maintenance and repair work on aircraft which he brought to that location, working at first in the basement of his home and shortly thereafter in a garage which he built.

18. At about the same time Alphin discussed with Henson the possibility of Alphin acquiring privately owned property (no. 9 on the plan, now occupied by the Civil Air Patrol), adjacent to the north boundary of the airport, a short distance north of the City hangar. Henson said that he would not allow Alphin access to the airport from that site, and Alphin did not attempt to go over Henson's head to any City official in connection with his request.

19. Alphin returned to work for Fairchild in March 1953, but continued to do maintenance and repair work on his own, in the City hangar and in his own garage. He is particularly skillful in the repair and rebuilding of badly damaged aircraft, which are hauled to his shop. He continued this operation after he was laid off by Fairchild in 1959. He would have liked to have a shop on the airport property, but Henson told him that no suitable space was available. It is true that no suitable space in a building was available except the space Alphin already had in the City hangar, and Alphin did not ask the City or any City official to rent him space to build a shop.

20. In 1962 Alphin leased from Henson the northern portion of the first T-hangar which Henson had build on the land he had purchased from Fairchild (no. 5 on the plan). Henson caused that portion of the hangar to be built wider than the other parts, so that Alphin could use

it more effectively for the maintenance and repair work he was doing.

21. In 1966 Alphin purchased a portion of a tract of land (nos. 10a and 10b on the plan) extending from Oaks Road to Route 11 as it now runs. The western portion of the tract (10a), which is immediately across Oaks Road from the airport property, is now occupied by six buildings, five of which were built by Alphin between 1966 and 1973.[9] Alphin conducts his maintenance, repair and reconstruction activities from that location, although he still uses the portion of the T-hangar which he first rented from Henson in 1962.

22. When Alphin purchased his present location in 1966, there was a rough road on the airport leading from a point on Oaks Road opposite the west side of Alphin's property to the south side of the east-west runway. The road had been prepared for trucks hauling fill on the airport.

23. With Henson's permission, Alphin placed gravel on the road, and later, with the permission of and supervision by Van Eykelbosch, the City Engineer, Alphin employed a contractor to grade and surface the road, making it a reasonably satisfactory taxiway from the east-west runway to Alphin's property, and also suitable for hauling materials to and from the portion of the T-hangar leased to Alphin.

24. Alphin ties down planes on which he is working, has worked or is about to work, either on his own property or on the airport property on both sides of the taxiway just across Oaks Road from his property (nos. 11a and 11b on the plan). He pays very little in tie-down fees

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[9] Alphin has a gentleman's agreement with the seller not to build any commercial buildings on the east half of the land. There is still a little room, however, for some additional building on the western half, but not enough for a hangar.

to the City, because he contends that tie-down fees are not payable on aircraft waiting repair or under repair. The City officials disagree with that position and the dispute has not been resolved.

The Interim Airport Authority and The Research Group, Inc. (1969-1971)

25. Neither the citizens of Hagerstown nor its officials showed much interest in the development or management of the airport until 1969. In that year, at the suggestion of the Chamber of Commerce, a Hagerstown-Washington County Interim Airport Authority was appointed to "function as a liaison unit to the City and County governmental units . . . (and) study . . . the airport operations and problems". Henson was an adviser to the interim authority.

26. The Maryland Department of Economic Development assisted the City of Hagerstown and Washington County by obtaining funds from the Appalachian Regional Commission to finance this study, and then entered into a contract with The Research Group, Inc. to render the necessary professional and technical services. FAA concurred in the general arrangement.

27. The Research Group, Inc. submitted two progress reports, and in May 1971 presented an 80-page report, with two appendices, and an introduction, overview and summary of recommendations. The recommendations included the following:

> "1. To adequately and effectively maintain and expand the airport serving Hagerstown and Washington County, new ownership policy, management and financial arrangements should be adopted. Transfer of airport ownership and primary support to Washington County is recommended."
>
> "2. A development policy and plan should guide decisions on public and private investment in the airport area."

> "10. Terminal facilities for Hagerstown air carrier service are inadequate and a new terminal structure should be designed and constructed."
>
> "12. Four new leases should be drawn and executed. One should describe the responsibilities of the Fixed Base Operator in business at Hagerstown Municipal Airport and his ground and structure rents, duties, and obligations. Another should describe the agreement between Allegheny Commuter Airlines and the airport policy board for new terminal and terminal area space. A third lease should be executed between Alphin Aircraft and the airport policy board for ground rent and taxiway access. The fourth lease should describe the privileges and payment arrangements with Fairchild Hiller Corporation for property and access."

28. With respect to Alphin, that report stated: "A lease for $1,000 annually is recommended for rental of city land and taxiway access for Alphin Aircraft, provided no change in present aircraft rebuilding operations is anticipated."[10]

29. On September 30, 1971, the Interim Airport Authority wrote to the Mayor and City Council and the County Commissioners enclosing copies of the report, stating that there had been some fundamental differences in concepts, and referring to a meeting to be held to discuss the report. The Interim Airport Authority stated "that

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[10] Those operations were, as indicated in Findings 19-24, the tie-down on airport property opposite Alphin's plant of aircraft under repair or awaiting repair or being otherwise worked on by Alphin, and the use of the taxiway and other portions of the airport for bringing aircraft and supplies from other places on the airport to Alphin's property or to the portions of the airport then being used by Alphin for tie-down of aircraft, as aforesaid. Alphin also rents storage space in a T-hangar.

two items deserve careful consideration regardless of how the ownership of the airport finally evolves". Those items are set out in the margin.[11]

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[11] Those recommendations of the Interim Airport Authority were:

"1. We recommend that a citizens type Airport Commission be appointed by the governmental body owning the airport for the study of programs needed, negotiating contracts with airport tenants, overseeing commitments to these contracts, and in general be responsible to the elected officials for the proper progress and operation of the airport. (As examples, a program of this type has been successful at Salisbury, Maryland, and our own Washington County Economic Development Commission.)

We recommend that the present. Interim Airport Authority be dismissed and the new Airport Commission be appointed with its membership to include representatives as follows:

a. 1 Representative from Hagerstown City Council

b. 1 Representative from Washington County Commissioners.

c. 1 Representative from General Aviation Users of the Airport.

d. 4 Representatives from Business Community at Large.

This Commission should be given definite guidelines for operation by the governing bodies and instructed to begin implementing the 'Outline for Action' not later than January 1, 1972.

"2. We recommend that the Fixed Base Operator be considered the Resident Airport Manager and that his lease be negotiated on this basis.

In such an arrangement, the airport management would be serving at no out-of-pocket cost to the airport owner(s). This type of arrangement has been, and continues to operate in all of our neighboring cities, including Cumberland, Winchester, Martinsburg, Chambersburg, Frederick, Easton and Salisbury.

We cannot afford to experiment with programs less professional than that which has proven successful at our and other communities in our area."

EVENTS BETWEEN OCTOBER 1971 AND THE FILING OF THE ORIGINAL COMPLAINT IN THIS ACTION IN MAY 1973

30. The proposals in the report of the Research Group (see Findings 27, 28, above) and those in the letter of the Interim Airport Authority (see Finding 29 and note 11) received wide publicity in the Hagerstown newspapers. Mayor Mills was negotiating a management contract with Henson, and a public meeting was held by the City Council on February 14, 1972, to discuss the proposed contract.

31. At the February 14 meeting various views were advanced.[12] Alphin expressed concern that his "rights" might not be protected if Henson were appointed airport manager, and was told by members of the Council that Henson would be acting as a City agent and that any disagreements could be taken up with the Council.

32. Two agreements between the City and HInc. were drafted during the early part of 1972 and executed under date of and effective May 17, 1972, pursuant to a resolution of the Council.

(i) One was a lease to HInc. as a "fixed base operator", granting it the exclusive use of specified portions of the airport for fixed base operations, and non-exclusive use for other activities theretofore conducted by HInc., with certain specified requirements to be observed by it. Under that agreement HInc., as the fixed base operator, obligated itself to furnish all items generally included in

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[12] On December 14, 1971, the President of Fairchild had written Herman L. Mills, then Mayor of Hagerstown, recommending that Henson be appointed airport manager, stating that a proposed lease arrangement between Fairchild and the City appeared fair and reasonable, and suggesting that the City consider some financial participation from other corporate users of the airport. He referred to the need for improving the existing airport operation, to keep abreast of the growing community, and stated that "the proposed operational plan may be considered our first step toward that goal".

a full fbo. FAA assisted in drafting portions of this agreement and did not object to it.

(ii) The other was a contract between the City and HInc. for the services of that corporation as a "Management Corporation to fully manage financially and operationally all aspects of responsibilities" in designated areas. It is an elaborate document, which is not illegal (see Conclusion 2, below), nor unreasonable except insofar as it might be interpreted to permit the management corporation to negotiate on behalf of the City with persons who would be prospective competitors of the management corporation in its own operations under its lease. The provisions of the management contract set out in the margin [13] would appear to discourage, even if they do not expressly prohibit, such negotiations by the management corporation with potential competitors. (See Finding 14 above, and Exhibit B at the end of this opinion). Nevertheless, during 1972 and 1973, with the knowledge of the then Mayor, Henson, as president of the management corporation, negotiated with Alphin and other persons desiring space on

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[13] "3. This Contract Agreement shall be subordinate to the provisions of any existing or future agreement entered into between the City and the United States to obtain Federal aid for the improvement or operation and maintenance of the airport.

"4. It is agreed that the Federal Aviation Administration will at all times look to the airport owner for effecting such actions as may be required to conform to the owner's compliance obligations. This Management Corporation which is authorized to perform the owner's management responsibilities, shall be considered as resident agents of the airport owner and not as responsible principles. (sic)

"5. It is understood that this Contract Agreement is made subject to such approval by the Federal Aviation Administration as required by law."

These provisions limit the duty given the airport manager to negotiate contracts between the City and commercial enterprises using the airport.

the airport for various activities which would compete with HInc., although final decision on any such application was to be left with the City officials. FAA knew that Henson was conducting such negotiations and did not object to his doing so.

33. On May 8, 1972, Alphin, through John M. Colton, Esq., of Hagerstown, an experienced attorney, wrote Henson with respect to a proposed lease he and Alphin had discussed with Henson a few days before. In substance, Alphin asked only for a lease permitting him to do what he was already doing without a lease, except that he wished to enlarge the area which he was using for tie-downs. The letter requested that six items be included in the lease.

"1. Access on and off the airport property to Alphin's hangar and place of business for Alphin, his employees, invitees and customers.

"2. Mr. Alphin would like space for tie-downs for his own aircraft as well as aircraft of his customers and invitees, as may be necessary. He would like use of the parcel of land lying west of his property and between his present taxiway and the Fairchild fence. It would be his responsibility for any damage to planes in this tie-down area, and not the responsibility of the airport operator.

"3. Naturally, the Lease will provide for abiding by the provisions of the Airport Master Plan.

"4. Mr. Alphin has already graded and laid gravel on the taxi-way leading to his hangar. The Lease will provide for his black-topping this taxiway, to be completed over the next five years. The maintenance and upkeep of this taxi-way would be his responsibility. He would also be responsible for snow removal from his taxi-way and cutting grass on the tie-down area, which would include the grass immediately adjacent to his taxi-way.

"5. We suggest the duration of the Lease be for a period of twenty (20) years at an annual rental of One Thousand ($1,000.00) Dollars per year for all items enumerated above.

"6. This Lease will contemplate Alphin's carrying proper insurance and being governed by FAA regulations."

34. Colton enclosed with his letter Alphin's check for $85 payable to Henson as "Airport Manger" to be applied for the month of May on the proposed $1,000 a year rental agreement. Alphin has continued to make the monthly payments ($75 for the eleventh and twelfth months) ever since. They have been forworded to the City and placed in the Airport Trust Fund, as other monies were. See n. 16, below. Alphin made no other request of Henson or the City at that time. Alphin continues to conduct the various operations referred to in Colton's letter.

35. On November 30, 1972, Henson sent Alphin a form of lease which contained a number of provisions to which Alphin objected.[14]

36. Sometime during December 1972, Alphin retained his present counsel, who on December 26, 1972, wrote Mayor Mills applying for lease of space and grant of

[14] The provisions to which Alphin objected included:

A rental of $2,000 a year.

"Privileges not granted:

"(A) The storage and sale of aviation fuels and oils. (Alphin had been selling oil in connection with his maintenance and repair work but had not been selling fuel.)

"• • •

"(G) Retail sale and installation of aircraft radio and other accessories. (Alphin had been doing this off the airport, sometimes buying avionics and other accessories from Henson at a substantial discount.)

"(H) Any and all operations not specifically granted."

privileges to conduct a fixed base operation at the airport, including the sale of fuel and oil. The letter referred to the proposed operation as a "full" fixed base operation; in fact, it asked for the space and privilege to conduct *any* of the activities included in a full fbo, although Alphin intended to perform only the more profitable ones.

The letter erroneously stated that there was "a heavy demand for additional service and facilities on the airport" and that "[e]xisting facilities [were] inadequate to meet the demand". The only unsatisfied demand which the Court finds to have been proved was for additional hangar space for inside parking of private aircraft, and Alphin did not intend to build any hangars for that purpose.

The letter requested information as to what space was available and the terms and conditions which the City proposed to include in a lease.

The letter stated: "It is obviously improper for Henson Aviation, Inc., to act on behalf of the City in negotiating the contract for a competitive service", and argued that "the purported delegation by the City to Henson Aviation, Inc., of such authority is void under Maryland law". The letter requested a meeting with a duly authorized official of the City to negotiate immediately for a competitive fixed base operation.

37. Prior to the December 26, 1972 letter, Alphin had never requested a full fixed base operation nor the right to sell fuel on the airport.

38. The income tax returns of Alphin and his wife show that during the years 1968 through 1972 Alphin's net profit from his business ran from $6,638 to $15,332.

39. The Court observed Alphin on the stand for three days, and finds that, although he is an excellent mechanic, he is not a good business man.

40. Alphin offered the testimony of three men who said that they were willing to finance him in a fixed base operation at a suitable location on the airport. None of

them testified whether they intended to lend the money or buy stock in a corporation.[15] The Court finds that it is unlikely that any of them would finance the suggested venture.

41. The Court finds that the December 26, 1972, letter (see Finding 36) was principally intended to help establish a claim for violation of the antitrust laws.

42. Mayor Mills sent the letter to Henson, who in turn sent it to the City Attorney. On January 3, 1973, Henson sent to the Mayor and all Councilmen an elaborate statement of the factors which he believed important in considering Alphin's new request. He recommended that the proposal be rejected for reasons which he stated, including: (1) that Alphin wanted the right to engage in the more profitable portions of a full fixed base operation (particularly the sale of fuel), without agreeing to furnish the less profitable services which HInc. was required to furnish under the terms of its lease agreement; and (2) that it was desirable to update the master plan before leasing to anyone space for a full fixed base operation.

43. The Court finds on all the evidence that the City was and is justified in not accepting the proposal contained in Beckman's letter of December 26, 1972, and in not making any long term commitments with respect to space on the airport until a final layout plan is adopted.[16]

44. On the other hand, the Court finds that Henson's objection to Alphin's proposal was based in part upon Henson's reluctance to have competition for the more

[15] Alphin's present counsel caused Alphin to incorporate his business in April 1974.

[16] It should be noted that when the Grove Manufacturing Company sought in November 1973 an option to rent land for a corporate hangar in the area now designated for corporate hangars on the preliminary layout plan, the City refused to grant such an option, but by mutual agreement between the City and Grove placed the check for $2,000 which Grove tendered in the airport trust fund.

profitable services which were a part of the package of services which HInc. was then furnishing.[17]

45. A city election was impending. it resulted in a new Mayor, who took office early in April 1973.

46. Meanwhile, on January 26, 1973, Henson met with Alphin and his present counsel, and discussed possible sites for an fbo, as well as the proposal Alphin had made through his previous counsel in 1972. At that meeting and ever since Alphin and his present counsel have insisted that Alphin be allowed to rent at once the large area designated as nos. 12a and 12b on the plan (Exhibit A), which is and has been for some time reserved for other uses, at one time for an administration building, and more recently, partly for corporate hangars (12a) and partly for automobile parking (12b), because it is adjacent to the road and is near the terminal building and the motel.[18] The Court finds that the demand by Alphin's counsel for a lease of that space at that time or at this time is unreasonable, in view of the fact that an airport layout plan was in January 1973 and is still under preparation. A preliminary airport layout plan, dated October 4, 1974, was offered in evidence and the final plan is expected early this year (1975).[19]

[17] The propriety of the designation by the City of Henson as the person to negotiate with Alphin will be discussed below.

[18] It is so designated on the preliminary airport layout plan prepared by the consulting engineers.

[19] During the negotiations between Alphin, his present attorney and Henson, Henson suggested that Alphin might be able to purchase or rent a part of the Schindel form (no. 13 on Exhibit A), and offered to see whether the Schindels, who are related to him, would be willing. The Schindels, however, are unwilling to sell or lease part of their farm. The City, reasonably, does not wish to condemn any property until the finel layout plan is adopted. Alphin's present counsel questions the power of the City to condemn land outside the City, despite Art. 1A, § 7-701, Anno. Code of Md., Vol. 1, 1974 Cum. Supp., and *Friendship Cemetery* v. *City of Baltimore*, 197 Md. 610, 81 A.2d 57 (1951).

47. On February 6, 1973, Beckman wrote Mayor Mills a letter, asking again to deal directly with the City, suggesting that the Mayor and his "colleagues on the City Council" were "acting in violation of Federal law and State law and were exposing the City and themselves personally to penalties for such violation". Beckman also wrote a similar letter to Henson. Henson replied on February 19, outlining his view of the negotiations he had had with Alphin and Alphin's attorneys, and expressing a willingness to continue negotiations "in relation to his original desires or that of a full fixed base operation". Beckman replied to Henson, again objecting to having to deal with him rather than a City official.

48. At a meeting held on February 26, 1973, attended by Alphin, Beckman, Henson, Mayor Mills, City Attorney Oswald and two men from FAA, complaints were voiced by Alphin's attorney against the City and by the City Attorney against Alphin. Henson suggested an area north of the western portion of the east-west runway for Alphin's operation (no. 14 on the plan). Alphin rejected it. The absence of a road or taxiway leading to that area justified Alphin's rejection.

49. FAA did not conclude that the City was being unreasonable in not leasing to Alphin the area which Alphin was seeking, and in wishing to wait for the completion of the master plan and a determination of how new facilities would be financed before entering into long term leases.

50. Other persons were interested in leases on the airport for various commercial activities, ranging from an engine repair shop to a full fixed base operation. Letters from three such persons written in 1973 were offered in evidence.

FROM THE FILING OF THE ORIGINAL COMPLAINT HEREIN ON MAY 7, 1973, TO TRIAL IN JANUARY 1975

51. On May 7, 1973, Henson sent Alphin a form of lease, similar to proposed leases he was offering or prepared to offer to other applicants for space on the airport to conduct a full fixed base operation. Alphin testified that it was this letter and proposed lease which prompted him to direct his attorney to file suit. In fact, however, Alphin's original complaint against Henson and HInc. had been filed in this Court on May 4, 1973. Service of process was made on May 10.

52. The proposed lease was for full fbo, granting the operator the right to conduct and requiring him to conduct the operation for a period of 20 years. No specific location nor amount of rent was specified. Most of the requirements in the proposed form of lease were not inherently unreasonable, although Alphin reasonably objected to some of them. Basically, Alphin did not want to be required to conduct the same fbo as was being conducted by Henson. He wanted to be able to sell fuel and conduct the other profitable operations, without the obligation to offer the less profitable services which Henson was offering.

53. On the other hand, the terms which Henson proposed in the drafts of leases sent to Alphin in November 1972, and to Alphin and one or more others in May 1973, would have handicapped if not prevented Alphin and the others from effectively competing with HInc. and were intended by Henson to have such effect.

54. On May 17, 1973, Beckman wrote Mayor Paddock, who had taken office in April, stating his objections to the lease proposed by Henson and calling on the Mayor to establish a Municipal Airport Board to operate the airport, with whom Alphin "can negotiate a fixed base agreement in the best interests of the City".

55. Mayor Paddock replied on July 24, explaining the delay in answering the letter and stating: that the airport matter had been reviewed and discussed with FAA and with airport personnel; that he understood Beckman had some reluctance in dealing with Henson; and that the

Mayor and Council, as the ultimate authority, were more than willing to discuss Beckman's request at his earliest convenience. The Mayor suggested that Beckman prepare a specific proposal.

56. Alphin's proposal was not submitted to the City until May 1974, after Alphin had joined the City as an additional defendant in this case in February 1974.[20] Alphin blames the delay in submitting his proposal to the failure of the City to tell Alphin what land would be available for him. This Court finds, however, that the City was justified in not selecting a particular area to be leased to Alphin: (1) because it is in the public interest not to enter into any long term leases with anyone until the lay-out plan has been finally submitted and discussed; (2) because other persons are interested in obtaining a lease or other contract to furnish some or all services on the airport which would be included in a fixed base operation; (3) because Alphin wishes to have the right to furnish only those services which he believes would be profitable, and it has not been shown that a full fixed base operation, such as HInc. now furnishes, could be conducted profitably if a competitor were allowed to furnish only the more profitable elements thereof; and (4) the City has the duty to consider the public interest in these and other questions.

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[20] Alphin's proposal to the City was made in the name of his newly chartered corporation, Alphin Aircraft, Inc. (AInc.). After a preliminary history and discussion, the proposal sought a lease of the land east of the Landis hangar (see Findings 46 and 57), as well as the existing taxiway and the parking and tie-down area which AInc. now uses (see Finding 24). The proposal was that AInc. agree to erect hangars and support facilities on the airport, said buildings being valued at no less than $300,000, and upon completion deed them to the City in consideration of AInc.'s right to occupy the buildings for 30 years, and to have the right to engage in specified aeronautical activities and other services to be rendered to the public as the need for such services is recognized. Findings 39 and 40 apply to this proposal; but see n. 23, below.

57. In the latter part of 1973 the Grove Manufacturing Co., a large employer in the Hagerstown area, approached Henson in an effort to obtain a lease of a part of the land which Alphin wants. Grove wished to lease the land to build a corporate hangar, with adjacent parking area, which is the use for which the land is tentatively assigned. Grove tendered to Henson a check for $2,000 for an option, which the City refused to grant. By agreement of Grove and the City, the check was deposited in the Airport Trust Fund, without obligation on the part of the City to enter into the proposed lease.

58. In 1974, Smith, one of Alphin's present counsel, complained to the FAA that the proposed location of the glide slope (a component of the instrument landing system) south of the east-west runway would require the relocation of the taxi-way used by Alphin, and that the location was chosen by Henson and the City for an improper purpose. FAA investigated and found that the taxiway would have to be relocated even if the glide slope were located north of the runway, as Alphin requested and as it was finally located. FAA found no violation of its rules, and this Court finds no improper motivation for any position taken by the City or Henson in connection with the location of the glide slope.

Discussion and Conclusions

The general principles established by the courts in construing the antitrust laws are well known and need not be repeated. See *United States* v. *Grinnel Corp.*, 384 U.S. 563 (1966); *United States* v. *First Nat. Bank & Trust Co.*, 376 U.S. 665 (1964); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *du Pont & Co.*, 351 U.S. 377 (1956); *Lorain Journal Co.* v. *United States* 342 U.S. 143 (1951); *Schine Theatres* v. *United States*, 334

U.S. 110 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United Shoe* v. *Aluminum Co. of America*, 148 F.2d 416 (2 Cir. 1945).

It has been held that the antitrust laws are aimed at private action, not a governmental action; that states, cities and governmental agencies cannot be held liable for violations of the antitrust laws; and that restraints of trade which arise from valid governmental action cannot give rise to private antitrust liability. *Parker* v. *Brown*, 317 U.S. 341 (1943); *Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1 Cir. 1966); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1 Cir. 1970); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency*, 433 F.2d 131 (8 Cir. 1970); *Padgett* v. *Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6 Cir. 1974); and cases cited in those opinions.

In *Wiggans Airways*, supra, the Massachusetts Port Authority entered into an exclusive lease with a private corporation for the fixed base operations at Logan Airport in Boston, thereby precluding other private corporations from participating in those activities. The First Circuit concluded: "It is clear that in [executing the lease, the Port Authority] was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use". 362 F.2d at 55.

In the instant case the City has been operating the airport under Art. 1A, § 13 (now § 7-701) of the Maryland Code.

THE MONOPOLY ISSUE

CONTRACTS BETWEEN THE CITY AND HENSON OR HINC.

Henson developed over the years a monopoly, in the popular sense of the term (see *United States* v. *Griffith*, 334

U.S. 100, 106) in some but not all Commercial aeronautical activities on the airport.[21]

Conclusion 1. Insofar as any monopoly which Henson and HInc. have enjoyed is the result of the leases which the City entered into over the years with Henson individually or with HInc.; it is not a monopoly which is unlawful under the antitrust laws; the City had and has the right to decide whether it is in the best interest of the public to enter into such leases with one or with two or more persons or corporations. *Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1 Cir. 1966); and other cases cited in the second paragraph under the heading "Discussion and Conclusions", above.

Conclusion 2. Moreover, the City had the right to designate Henson or HInc. as the airport manager. The evidence shows that it is common practice in Maryland and elsewhere for cities the size of Hagerstown to have the fixed base operator act as airport manager. FAA has been familiar with the agreements which the City has had with Henson and HInc. over the years, including the 1972 agreements, and no objection thereto has been made by FAA officials or other personnel. For a further description of the management contract, see Finding 32 (ii).

THE CONSPIRACY ISSUE

The fbo lease between the City and Henson Aviation, Inc., did not grant Henson or HInc. any exclusive right to furnish fbo services on the airport. Plaintiffs have failed to prove that the contract designating HInc. as airport manager was intended by the City to authorize Henson or HInc. to prevent other persons desiring to furnish fbo

[21] Alphin and others, including Fairchild, used the airport property to some extent in various ways, e.g., for tying down aircraft and storing supplies in connection with some fbo services or other commercial activities which they rendered or conducted, principally off the airport, but to a limited extent on the airport.

services on the airport from dealing directly with the City for such privileges. City officials knew that Henson was negotiating with Alphin and others, including Fairchild, Grove, Colaluca and Van Tries, during 1972 and 1973, but it has not been shown that any of the applicants except Alphin objected to negotiating with Henson. Alphin, through his new attorney, made his first such objection to the City during the last month of the old administration. When the objection was renewed in the first days of the new administration, and the new Mayor had had a reasonable time to investigate the matter, he invited Alphin and his counsel to deal directly with the City officials rather than with Henson with respect to the proposed lease to Alphin of space on the airport.

Conclusion 3. Plaintiffs have failed to prove any conspiracy in violation of the antitrust laws between the City or any of its officials and Henson or HInc.[22]

ATTEMPT TO MONOPOLIZE

Conclusion 4. When Henson, as airport manager, undertook to represent the City in negotiating a lease with Alphin and others who wished to furnish some fbo services on the airport in competition with Henson or HInc. (which Henson did during a period of a year or so before July 1973) and proposed to Alphin and others terms which would have tended to protect from competition the business which Henson Aviation, Inc. then had on the airport,

[22] In the recent case of *United States* v. *Standard Oil Co. of California*, 362 F. Supp. 1331 (N.D. Cal. 1973), aff'd 412 U.S. 924 (1973), an injunction was issued against Standard Oil of California because the Court concluded that So. Cal. had violated the Sherman Act by engaging in a continuing combination and conspiracy with various persons, including certain officials of the Government of American Samoa *and two private corporations* (Van Camp and Star-Kist) to unreasonably restrain and monopolize the distribution and sale of petroleum products in American Samoa.

he went beyond the limits permitted by the antitrust laws. Cf. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1 Cir. 1970).

Conclusion 5. The Court has found that the terms which Henson proposed in the drafts sent to Alphin in November 1972 and to Alphin and one or more others in May 1973 would have handicapped if not prevented Alphin and the others from effectively competing with HInc., and were intended by Henson to have such effect. The Court finds and concludes that the submission of these proposed leases in 1972 and 1973 was an attempt by Henson to monopolize the furnishing of fbo services on the airport, in violation of 15 U.S.C. 2.

INJUNCTION AGAINST HENSON AND HINC.

Conclusion 6. Alphin and others who wish to render some fbo services on the airport have the legal right to try to persuade the City officials: (a) that it would be in the public interest to have more than one fixed base operator on the airport; or (b) if the City decides that it is in the public interest to have only one fixed base operator, that the applicant should be the one rather than HInc.[23] *Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961); *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1 Cir. 1970).

Conclusion 7. Alphin is entitled to an injunction restraining Henson and HInc. from attempting to monopolize any part of the business they now conduct on the airport under their existing lease, by negotiating on behalf of the City, as airport manager or otherwise, or using the position of airport manager in an effort to prevent others from establishing competitive operations, or in any other way that would violate § 2 of the Sherman Act.

[23] Despite Findings 39 and 40, Alphin should be given a fair opportunity to demonstrate to the City officials his claimed ability to finance his most recent or any future proposal.

INJUNCTION AGAINST THE CITY

It is at best very doubtful whether an injunction may be issued against a City under 15 U.S.C. 26. *Parker* v. *Brown*, 317 U.S. 341 (1943), and other cases cited above. However, it is not necessary to decide that question in this case, because this Court has concluded that an injunction can be and should be issued against the City (a) under the general equitable jurisdiction of this Court, and (b) under its pendent jurisdiction, invoked in Count II of the amended complaint.

(a)

The "non-exclusivity" provisions of 49 U.S.C. 1349(a) and of the applicable FAA Advisory Circular, dated 4 April 72, are set out in Exhibit B. This Court has found (Finding 14) that FAA was familiar with the arrangements between Henson and the City, has dealt with Henson as the representative of the City on the airport over the years, and has not found that the relationship of Henson with the City, nor the operations which Henson and HInc. conducted on the airport. violated the "non-exclusivity" provisions of any applicable law or policy. It is not clear, however, that FAA approved the action of the former Mayor in authorizing Henson in late 1972 to negotiate on behalf of the City with Alphin and other persons who wanted to conduct operations on the airport which would compete with those being conducted by HInc. Although it does not appear from the evidence that the present City administration has permitted such negotiations, the position of Henson, as president of HInc., the airport manager, and the need of the City to consult Henson individually and as the president of the Airport Manager, requires the City to draw a line between what is permissible and what is not permissible under 49 U.S.C. 1349.

Conclusion 8. This Court has concluded that no broad injunction restraining the City in its operation of the air-

port should be granted, but that the history of the relationship of Henson with the City justifies and requires the issuance of a narrow injunction, restraining the City and its officials from permitting Henson to negotiate on behalf of the City with persons seeking leases or contracts permitting them to engage in activities on the airport which would compete with those engaged in by Henson, HInc., or any other corporation in which Henson is an officer or a stockholder.[24]

(b)

The facts also justify such an injunction under Maryland law, particularly Article 41 of the Declaration of Rights, a part of the Maryland Constitution, as expounded in an elaborate opinion by the late Judge Offutt of the Court of Appeals of Maryland in *Raney* v. *County Commissioners of Montgomery County*, 170 Md. 183 (1936), which resulted in an injunction against the County based on Article 41. In the course of his opinion Judge Offutt said:

> "Article 41 of the Maryland Declaration of Rights declares that 'monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.' Apart from that declaration, the instrument contains no denunciation of special privileges, except such as may be implied from the form of government which it erects.

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[24] "In exercising its equitable jurisdiction, '[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.' *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435 (1941). See also *United States* v. *National Lead Co.*, 332 U.S. 319, 328-335, and n. 4 (1947)." *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 132 (1969).

But when the democratic nature of that government, and the care and foresight exercised, in the formulation of that instrument, to safeguard the citizen in the enjoyment of privileges and immunities which were regarded as of common right, are considered, it is manifest that its people never intended that so highly important a right as that of equality before the law should be without protection. So that when the meaning to be given the word' monopoly,' as used in article 41, is considered, great weight is to be given to the fact that but for that article the Constitution affords to the citizen no express protection against special and oppressive privileges.

"The word itself ordinarily connotes a privilege connected with commerce in commodities because, historically, it was more often used to describe a condition which resulted from an exclusive privilege to engage in such commerce, but it has long had a broader meaning, more in harmony with the spirit of the Constitution, and, in determining the sense in which it is used in that instrument, it should be given that meaning, that its general intent may be served, rather than thwarted or confined by any narrow or over nice construction." 170 Md. at 190.

THE ISSUE OF DAMAGES

Conclusion 9. It is clear that Alphin is not entitled to recover any damages against the City.[25]

However, if Alphin had proved that he suffered any damage as a result of any attempt to monopolize by Henson

[25] The amended complaint does not ask for damages against the City. A state, city or goverrnmental agency may not be held liable for damages under the antitrust laws. *Parker* v. *Brown*, 317 U.S. 341 (1943).

during the period of three years before May 4, 1973, he would be entitled to recover damages against Henson and HInc.

Conclusion 10. The Court finds and concludes, however, that Alphin has failed to prove that he suffered any pecuniary loss as a result of any such attempt to monopolize, either during the three year period before May 4, 1973, or since that time. The facts which form the basis for this conclusion are set out in Findings Nos. 25 to 58. In summary, the Court has found that the City was and is justified in not entering into any long term leases or other agreement for a second fixed base operation on the airport until final layout plan has been approved. Meanwhile, Alphin has been doing exactly what he asked to be allowed to do in May 1972 (see Findings 33 and 34).

Conclusion 11. The Court finds and concludes that even if Henson had not attempted to impede Alphin's efforts to obtain the type of lease Alphin wanted, the City would not, up to the present time, have entered into a lease or other agreement with Alphin permitting him to conduct the type of operation outlined in Beckman's letter of December 26, 1972 (see Finding 36) and/or in Alphin's proposal of May 1974 (see Finding 56).

The Court finds and concludes that Alphin has not proved that any false statements were made to or material facts withheld from any public officials by Henson. Such cases as *Woods Exploration & Pro. Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5 Cir. 1971), and *Walker, Inc.* v. *Food Machinery*, 382 U.S. 172 (1965), are no authority for relief in this case.

Moreover, Alphin has not proved that he has suffered any damage as a rsult of Henson's attempt to monopolize. The Court has considered such cases as *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), which hold that

juries are allowed to act upon probable and inferential, as well as direct and positive proof of damages. However, applying the liberal standard of such cases, this Court finds and concludes that Alphin has not shown that he could have financed and operated profitably a full fbo on the airport, if he had been given such a lease or contract by the City.

ATTORNEY'S FEE

Although there is no Supreme Court case directly in point, the opinions of the lower federal courts are apparently unanimous in concluding that no attorney's fee may be allowed a plaintiff who obtains an injunction but no damages in a case brought under the antitrust laws. *Byram Concretetanks, Inc.* v. *Warren Concrete Products Co.*, 374 F.2d 649 (3 Cir. 1967), and cases cited therein.

Conclusion 12. In this case, not only the denial of the claim for damages, but also the narrowness of the injunction which will be issued and the findings with respect to the negotiations and correspondence before the filing of the action (see particularly Findings 33-37, inclusive) justify, if they do not require, the denial of an attorney's fee to Alphin as part of his costs.

COUNTERCLAIM

Conclusion 13. Judgment will be entered in favor of Alphin, the counterclaim defendant, on the counterclaim filed by Henson and HInc. against him for malicious abuse of process.

CROSS CLAIM

Henson and HInc. dismissed their cross claim against the City after the Court stated it would deny plaintiffs' claims for damages.

COSTS

Conclusion 14. Alphin should recover his taxable costs[26] against Henson and HInc. Henson, HInc. and the City should each bear his or its own costs.

/s/ THOMPSON
United States District
Judge

[26] See *Advance Business Systems & Supply Co.* v. *SCM Corporation*, 287 F. Supp. 143, at 161 et seq. (D. Md. 1968), aff'd 415 F.2d 55 (4 Cir. 1969).

Exhibit A

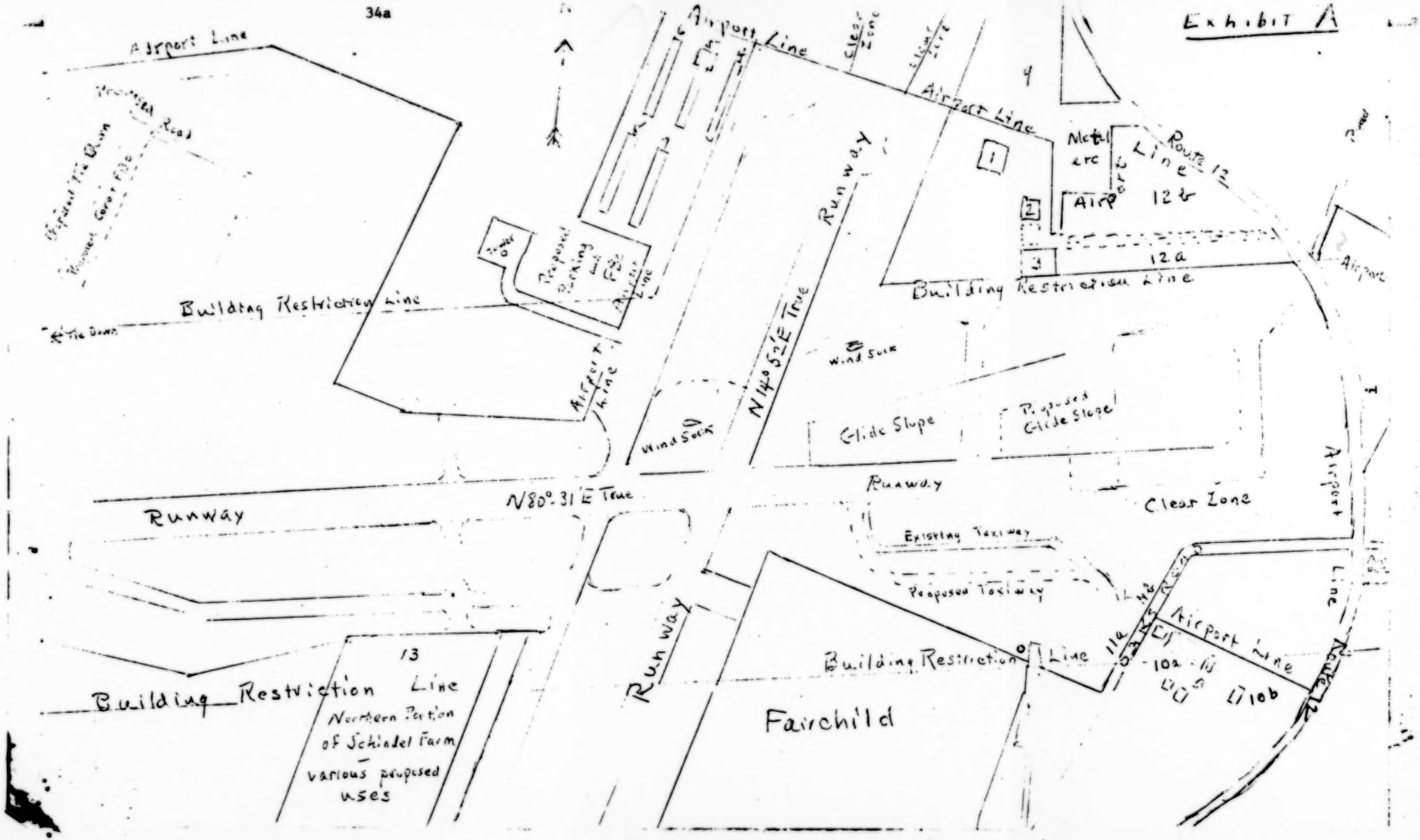

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Exhibit B

Title 49 U.S.C. 1349(a) provides in pertinent part: "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

FAA has issued policy statements and advisory circulars from time to time. The seven page Advisory Circular dated 4 April 72 contained the following statements, *inter alia*:

> "6.a. *Exclusive Right.* A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or rights would be an exclusive right.
>
> "7. *POLICY.* The grant of an exclusive right for for the conduct of any areonautical activity, on an airport on which Federal funds, administered by the FAA, have been expended, is regarded as contrary to the requirements of applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means. • • •
>
> "a. *Agency Position.* The agency considers that the existence of an exclusive right to conduct any aeronautical activity limits the usefulness of an airport and deprives the using public of the benefits of competitive enterprise. Apart from legal considerations, the agency believes it clearly inappropriate to apply Federal funds to improvement of an airport where full realization of the benefits would be restricted by the

exercise of an exclusive right to engage in aeronautical activities.

"b. *Application of Law.* The exemption contained in a surplus property deed permitting the grant of an exclusive right for the sale of gas and oil does not operate to confer a positive privilege. If the airport was already obligated by a prior agreement prohibiting an exclusive right, the deed does not relieve the owner from such obligation. Conversely, where such an exemption for gas and oil is in effect, any subsequent grant of Federal funds, administered by the agency, requires the airport owner to agree not to permit the establishment of an exclusive right to engage in aeronautical activities, including the sale of gas and oil, in the future and to terminate any existing agreement which permits such an exclusive right as soon as possible.

"8. *INTERPRETATION OF POLICY.* The circumstances involved in arranging for the availability of adequate aeronautical services vary widely from airport to airport. The following material has been prepared in an effort to furnish general guidance based on experience with exclusive rights problems.

"a. *Single Activity.* The presence on an airport of only one enterprise conducting aeronautical activities does not necessarily mean that an exclusive right has been granted. If there is no intent by express agreement, by the imposition of unreasonable standards, or by other means to exclude others, the absence of a competing activity is not a violation of this policy. This sort of situation frequently arises where the market potential is insufficient to attract additional aeronautical activities. So long as the opportunity to engage in an aeronautical activity is available to those who meet reasonable and relevant standards,

the fact that only one enterprise takes advantage of the opportunity does not constitute a grant of an exclusive right.

"b. *Space Limitations.* The leasing of all available airport land or facilities suitable for aeronautical activities to a single enterprise will be construed as evidence of an intent to exclude others. This presumption will not apply if it can be reasonably demonstrated that the total space leased is presently required and will be immediately used to conduct the planned activity. The amount of space leased to a single enterprise should be limited to that for which it can clearly demonstrate an actual, existing need. If additional space becomes necessary at a later date, it must be made available, not only to an incumbent enterprise, but at the same time to all qualified proponents or bidders. The advance grant of options or preferences on future sites to a single incumbent is evidence of an intent to grant an exclusive right. On the other hand, nothing in this policy should be construed as limiting the expansion of a single enterprise when it needs additional space, even though it may ultimately reach complete occupancy of all space available.

"• • •

"9. *ENFORCEMENT.*

"• • •

"c. *Application to Preexisting Agreements.* On 17 July 1962, the agency defined the aeronautical activities by section 308(a) of the Federal Aviation Act. Prior to the publication of this definition, exclusive rights to conduct certain activities not involving the actual use of public landing areas were considered not to be in violation of the statute. • • • The termination date will in no event be later than the earliest renewal or cancellation date specified in the lease or

agreement covering such an exclusive right agreement. However, in no case will ADAP participation in airport improvement be authorized where there exists an exclusive right which was prohibited under the interpretation prior to 17 July 1962."

Paragraph 11a (1) requires all applicants for assistance to certify that there is no grant of an exclusive right which would preclude expenditure of funds by the agency under applicable law and agency policy at any public airport owned or controlled by the applicant, and 11a (2) requires that none will be granted on any airport owned or controlled by the applicant. Para. IIb states:

"It is the intent of this policy to promote fair competition at public airports and not to expose those who have undertaken to provide commodities and services to irresponsible competition. Prudent airport owners will adopt and enforce minimum standards to be met by those who propose to conduct a commercial aeronautical activity. Such standards, by expressing minimum levels of service that must be offered, relate primarily to the public interest, but appropriate requirements uniformly applied discourage substandard enterprises, thereby protecting both the established aeronautical activity and the airport patrons. The application of any unreasonable requirement, or standard not relevant to the proposed activity, or any requirement that is applied in a discriminatory manner shall be considered a constructive grant of an exclusive right contrary to applicable law and provisions of agency policy."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1635

T.S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Appellants,

v.

RICHARD HENSON AND HENSON AVIATION, INC., AND CITY OF HAGERSTOWN, MARYLAND,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, Senior District Judge.

Argued December 4, 1975 Decided May 17, 1976

Before WINTER, *Circuit Judge*, FIELD, *Senior Circuit Judge*, and MERHIGE, *District Judge*.*

Carl W. Schwarz, (Metzger, Noble, Schwarz and Kempler; Robert M. Beckman, Frank Kingston Smith; Beckman and Smith on brief) for Appellants; George J. Goldsborough, Jr., and (Broughton M. Earnest on Brief) for Appellees Richard Henson and Henson Aviation, Inc.; (Robert E. Kuczynski, Daniel W. Moylan and William P. Nairn on brief) for Appellee The City of Hagerstown.

PER CURIAM:

T. S. Alphin and Alphin Aircraft, Inc., instituted this action against Richard Henson and Henson Aviation, Inc., together with the City of Hagerstown, Maryland, charging the defendants with violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. The plaintiffs sought damages as well as injunctive relief.

* Honorable Robert R. Merhige, sitting by designation.

The district court found that Henson had attempted to monopolize and granted injunctive relief under Section 16 of the Clayton Act,[1] but concluded that the plaintiffs had failed to prove that they had suffered any injury as a result of Henson's conduct and declined to award damages under Section 4 of the Act.[2] The court granted the plaintiffs' prayer for costs but refused their request for attorneys' fees, and the sole issue raised on this appeal is the denial of such fees.

We agree with the district judge that attorneys' fees could not properly be awarded in this case. As stated in *Byram Concretanks, Inc.* v. *Warren Concrete Prod. Co. of N.J.*, 374 F.2d 649, 651 (3 Cir. 1967):

> "In a long line of cases the courts have interpreted this section of the Clayton Act not to permit plaintiffs to recover attorneys' fees unless treble damages are awarded, regardless of whether injunctive relief is granted. Clabaugh v. Southern Wholesale Grocers Association, 181 F. 706 (C.C.Ala. 1910); Decorative Stone Co. v. Building Trades Council of Westchester County, 23 F.2d 426 (2nd Cir. 1928); Allen Bradley Co. v. Local Union No. 3, I.B. of E. Workers, 51 F.Supp. 36 (D.C. N.Y. 1943); Alden-Rochelle, Inc. v. American Soc. of C., A. and P., 80 F.Supp. 888 (D.C.N.Y. 1948)."

The failure of the plaintiffs to prevail upon their claim for damages precluded any recovery for attorneys' fees under Section 4, and the other theories urged upon us for the recovery of such fees are foreclosed under *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

The judgment of the district court is affirmed.

AFFIRMED.

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[1] 15 U.S.C. § 26.

[2] 15 U.S.C. § 15.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1635

T.S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Appellants,

v.

RICHARD HENSON AND HENSON AVIATION, INC., AND CITY OF HAGERSTOWN, MARYLAND,
Appellees.

On Petition for Rehearing

Submitted November 24, 1976.
Decided February 22, 1977.

Before WINTER, *Circuit Judge*, FIELD, *Senior Circuit Judge*, and MERHIGE,* *District Judge*.

Carl W. Schwarz, (Metzger, Noble, Schwarz and Kempler; Robert M. Beckman, Frank Kingston Smith; Beckman and Smith on brief) for Appellants; George J. Goldsborough, Jr., and (Broughton M. Earnest on brief) for Appellees Richard Henson and Henson Aviation, Inc.; (Robert E. Kuczynski, Daniel W. Moylan and William P. Nairn on brief) for Appellee The City of Hagerstown.

PER CURIAM:

In a previous appeal we affirmed the district court's ruling that defendants, Richard Henson and Henson Aviation, Inc., had attempted to monopolize the business they conducted at the Hagerstown (Maryland) Regional Airport in

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* Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

violation of § 2 of the Sherman Act and that plaintiffs were entitled to injunctive relief. Because plaintiffs could not prove damages as a result of these defendants' attempt to monopolize, we affirmed the district court's ruling that on the authority of Byram Concretanks, Inc. v. Warren Concrete Prod. Co. of N.J., 374 F.2d 649, 651 (3 Cir. 1967), plaintiffs could not recover attorneys' fees from these defendants pursuant to § 4 of the Act. Our opinion is reported in 538 F.2d 85 (4 Cir. 1976).

By order entered June 25, 1976, we stayed the issuance of our mandate to permit plaintiffs to apply for a writ of certiorari from the Supreme Court. The petition was filed in the Supreme Court on August 16, 1976. It was eventually denied on November 15, 1976. Notice of denial was received by us on November 22, 1976. In the interim, plaintiffs, on November 17, 1976, filed a motion for leave to file a second petition for rehearing. We entered a further stay of our mandate on November 19, 1976 until the matter could be decided, and directed Henson and Henson Aviation, Inc. to file an answer thereto. The answer was filed on November 24, 1976, and the matter is ripe for decision.

Plaintiffs' latest motion calls attention to the enactment of Public Law 94-435, known as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976," which, *inter alia*, added to the language of 15 U.S.C. § 26 the following:

> In any action under this section in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such a plaintiff.

The Act was signed by the President on September 30, 1976, and the quoted language became effective on that date.

The significance of the amendment to the plaintiffs is at once apparent when it is recognized that the injunction against these defendants was entered pursuant to the au-

thority vested in the district court by 15 U.S.C. § 26.[1] Thus, had the 1976 amendment been in effect at the time of decision by the district court, plaintiffs clearly would have been entitled to an award of attorneys' fees supplementing the injunctive relief which they were granted.

It is an established principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in mainfest injustice or there is statutory direction or legislative history to the contrary." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974).[2] In the instant case, de do not think that an award of attorneys' fees would result in manifest injustice. Plaintiffs, small aircraft maintenance and repair operators, have successfully vindicated the public interest and public policy expressed in the antitrust laws by bringing would-be monopolists to heel. Although it has been found that plaintiffs suffered injury as a result of defendants' illegal activities, plaintiffs have been denied any recovery for damages. Retrospective application of the 1976 Act would not, in our view, infringe any right of defendants which had matured or become unconditional; nor have defendants been denied the opportunity to be heard. Indeed, the subject of plaintiffs' claim to attorneys' fees has been the subject of litigation throughout. *See* Bradley v. Richmond School Board, 416 U.S. at 717-21. Finally, the 1976 Act, so far as pertinent, contains no limitation prohibiting its application to the

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[1] While the antitrust violation which defendants committed was an attempt to monopolize proscribed by § 2 of the Sherman Act, 15 U.S.C. § 2, § 16 of the Clayton Act, 15 U.S.C. § 26, is the statute empowering a court of the United States to grant injunctive relief against threatened loss or damage by a violation of the "antitrust laws." "Antitrust laws" is defined by § 1 of the Clayton Act, 15 U.S.C. § 12, to include the Sherman Act.

[2] It is of special interest that Bradley was a case involving an award of attorneys' fees pursuant to a statute enacted after the attorneys' services were rendered and after the case was submitted, but not yet decided, on appeal. The statute was held applicable and counsel fees ordered to be awarded.

present suit. The legislative history of the 1976 Act indicates that it was intended to apply.[3]

Our control over a judgment of our court continues until our mandate has issued, Gradsky v. United States, 376 F.2d 993 (5 Cir. 1967); Meredith v. Fair, 306 F.2d 374 (5 Cir. 1962), unless, of course, our control has been ousted by proceedings in the Supreme Court. Indeed, in exceptional cases, we may even recall our mandate to avoid injustice. Perkins v. Standard Oil Co. of California, 487 F.2d 672 (9 Cir. 1973); Powers v. Bethlehem Steel Corp., 483 F.2d 963 (1 Cir. 1973).

In the instant case, our mandate has not issued as a result of successive stays. We disagree with defendants that Rule 41(b), F.R.A.P., required that our mandate issue on November 15, 1976, the date that the Supreme Court denied certiorari. Read in the full context of Rule 41(b),[4] we think that the "filing of a copy of an order of the Supreme

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[3] During the Senate debates, Senator Abourezk asked Senator Hart (the moving force behind the legislation):

> Does this mean that following the usual rule, as in such cases as *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), actions brought prior to the date of enactment of this provision, yet decided after the date of enactment, will still be eligible for such attorneys' fees awards?
>
> MR. PHILIP A. HART. The answer is "yes," under that case and a number of other comparable cases.
>
> Cong. Rec. S 8960 (daily ed. June 10, 1976) (94th Cong., 2d Sess.)

[4] With emphasis supplied to the sentence relied on by plaintiffs, Rule 41(b) reads:

> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. *Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.*. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

Court, etc." refers to the filing in our court and not the original filing in the Supreme Court.[5] While the filing in our court occurred on November 22, 1976, we had already stayed issuance of our mandate by order filed November 19, 1976.

Thus, we conclude that our decision is not final and that we should amend what we previously decided to make it conform to the law which now exists.[6] We therefore grant leave to file the second petition for rehearing; we grant the petition for rehearing; and we withdraw the portion of our prior opinion affirming the denial of attorneys' fees. Instead, we reverse that portion of the district court's judgment and remand the case with directions to grant appropriate attorneys' fees in accordance with the 1976 Act. So that the case is not unduly fragmented, the district court shall make an allowance for attorneys' fees for services in this court and in the Supreme Court, as well as for services in the district court. Plaintiffs shall recover costs since they have ultimately prevailed on appellate review.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

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[5] Rule 1, F.R.A.P., states that the rules govern procedures in the United States Courts of Appeals. Since the Supreme Court does not issue a mandate when certiorari is denied, the issuance of the mandate is by a Court of Appeals. This indicates that the filing is with the court issuing the mandate. Additionally, the filing in the Supreme Court would not be of a "copy"; it would be the original order denying certiorari.

[6] Defendants contend that plaintiffs sought to bring the 1976 Act to the attention of the Supreme Court and that since the Supreme Court denied certiorari, it necessarily rejected the argument that the 1976 Act was applicable. We are not persuaded. The law is clear that the denial of certiorari decides nothing except that the writ will not be granted for reasons which are undisclosed.

FIELD, *Senior Circuit Judge*, dissenting:

As noted by the majority, in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), the Court stated "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." On May 17, 1976, we did just that when we filed our opinion in this case denying an award of attorneys' fees.[1] Thereafter we stayed our mandate to permit the plaintiffs to apply for a writ of certiorari, and on September 30, 1976, and while the petition for certiorari was pending, Public Law 94-435, amending 15 U.S.C. § 26, became effective. Certiorari was denied by the Supreme Court on November 15, 1976.

The majority, drawing primarily on *Bradley*, concludes that since our mandate had not issued [2] our decision in this case is not final and that we should therefore give the plaintiffs the benefit of the Amendment. In my opinion the rationale of *Bradley* is inapplicable to this case. In *Bradley* the statute had become effective while the case was pending in this court and had not yet been decided. In the present case, however, the case had been decided by us and had become a finality in this court over four months prior to the effective date of the Amendment. While I agree, of course, that the denial of certiorari has little or no decisional or precedential effect, nevertheless, it occurs to me that the Supreme Court would have been as perceptive as we in discerning any effect of the Amendment on this cmase. In my opinion the majority has intruded upon the legislative area in giving the Amendment retroactive effect.

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[1] *Alphin* v. *Henson*, 528 F.2d 85 (4 Cir. 1976).

[2] Rule 41(b), Fed.R.App.P., provides, *inter alia*, that "[u]pon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately." Since our mandate was initially stayed for the limited purpose of permitting the plaintiffs to file their petition for certiorari, I entertain serious doubts that our action in ordering a further stay after certiorari had been denied was consonant with Rule 41(b).

APPENDIX D

(CAPTION OMITTED IN PRINTING)

(FILED APRIL 5, 1977)

Order

Richard Henson and Henson Aviation, Inc. have joined in a petition for rehearing with a suggestion for rehearing in banc. The petition has been read and considered. A majority of the panel has voted to deny rehearing. Upon a request for a poll on the suggestion for rehearing in banc, a majority of the judges eligible to vote have voted to deny rehearing in banc.

It is, therefore, ORDERED that the petition for rehearing be, and it is hereby, denied. It is further ORDERED that the last sentence beginning on page 7 of the text of the slip opinion be stricken and the following inserted in lieu thereof: "Although it has been found that plaintiffs were among those adversely affected by defendants' illegal attempt to monopolize, plaintiffs have been denied any recovery for damages."

For the Court:

/s/ HARRISON L. WINTER
Harrison L. Winter,
United States Circuit
Judge

A True, Copy, Teste:
William K. Slate, II, Clerk
By /s/ EMILY RUEGER
Deputy Clerk

APPENDIX E

(Caption Omitted in Printing)

(Filed May 17, 1976)

Judgment

Appeal from the United States District Court
for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

(Seal)

A True Copy, Teste:
William K. Slate, II, Clerk

By G. F. Williams
Deputy Clerk

APPENDIX F

(Caption Omitted in Printing)

(Filed November 19, 1976)

Appeal From the United States District Court for the District of Maryland, at Baltimore.

On June 25, 1976 an order was entered by this Court staying the mandate in the referenced case pending timely application by the appellant to the United States Supreme Court for a writ of certiorari. The Court has been advised by the appellant in a petition for rehearing that certiorari was denied by the Supreme Court on November 15, 1976. Formal notification of that fact has not yet been received by the Clerk of this Court.

Upon consideration of the above, it is Adjudged and Ordered that the mandate is further stayed until the petition for rehearing is decided.

It is further Ordered that the appellee file a response to the petition for rehearing on or before November 30, 1976.

Entered for the Court by direction.

/s/ William K. Slate, II
Clerk

Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1585

RICHARD HENSON AND HENSON AVIATION, INC.,
Petitioners,

vs.

T. S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 392 F. Supp. 813 (D.Md. 1975) and is set forth at Appendix A of the Petition. The first opinion of the Court of Appeals for the Fourth Circuit is reported at 538 F.2d 85 (4th Cir. 1976) and is set forth at Appendix B of the Petition. A second opinion, withdrawing in part the prior opinion, has not yet been officially reported but is set forth at Appendix C of the Petition. An Order was entered by the Court of Appeals on April 5, 1977 making certain changes in said opinion (Appendix D of the Petition). Finally, and subsequent to the filing of the Petition herein, another Order was entered May 20, 1977 correcting a typographical error in the April 5, 1977 Order (Appendix A, *infra.*).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. On September 30, 1976, the effective date of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (hereinafter the "H-S-R Act"), was this action "pending" before the Fourth Circuit Court of Appeals within the meaning of *Bradley* v. *Richmond School Board*, 416 U.S. 696, 710 (1974)?

2. If so, did the application of the H-S-R Act by the Court of Appeals to award an attorney's fee in this case result in "manifest injustice" to Henson, the Petitioner herein?

3. Did the Court of Appeals err in awarding an attorney's fee, pursuant to the H-S-R Act, to an antitrust plaintiff who obtained the very same injunctive relief prayed for in his complaint?

STATUTE INVOLVED

The pertinent provisions of Section 16 of the Clayton Act (15 U.S.C. § 26), as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Public Law 94-435) are set forth in the Petition at page 3.

COUNTER-STATEMENT OF THE CASE

For more than 40 years defendants Richard Henson and Henson Aviation, Inc. ("Henson") have been the sole suppliers of a full range of aviation services (a "fixed base operation" or "fbo") at the Hagerstown Regional Airport, Hagerstown, Md. The airport is owned by the City of Hagerstown. Henson also acted as "airport manager," a practice which the District Court found to be the "usual practice" for cities throughout the United States the size of Hagerstown (or somewhat larger). In that capacity, Henson negotiated with potential competitors of the Henson fbo the terms of leases of facilities and the scope of competition with the Henson fbo.

Plaintiff, T. S. Alphin, d/b/a Alphin Aircraft ("Alphin"), an aircraft mechanic who at times operated his business out of the basement and garage of his home, has provided aircraft maintenance and repair work for users of the airport since 1948, earning a very modest living from such work.[1] In 1972, Alphin sought to expand his operation and to enter into broader competition with Henson by offering to sell fuel, oil and other services to airport patrons. Henson, purporting to be acting on behalf of the City of Hagerstown, sought to impose upon Alphin, and other potential competitors, restrictions which the District Court, sitting without a jury, found "would have handicapped if not prevented Alphin and the others from effectively competing with [Henson] and were intended by

[1] The District Court found that from 1968 through 1972 Alphin earned a net profit from this business ranging from $6,638 to $15,332 annually.

Henson to have such effect." Thus, the District Court concluded that Henson had gone "beyond the limits permitted by the antitrust laws" and found that Henson had attempted to monopolize the market in violation of Section 2 of the Sherman Act, entering appropriate injunctive relief.[2] Henson did not appeal this finding or result.

On the other hand, the District Court found that Alphin had not established a "pecuniary loss" flowing from Henson's unlawful action, 392 F. Supp. at 830, and therefore declined to award damages pursuant to Section 4 of the Clayton Act. Alphin did not appeal this finding or result.

As to Alphin's right to be awarded a reasonable attorney's fee, the District Court ruled, as a matter of law, that where no damages were awarded to an antitrust plaintiff a reasonable attorney's fee "may not" be allowed under Section 4 of the Clayton Act. And, despite its prior finding that Henson had the specific and unlawful intent to monopolize the market and to "handicap if not prevent" Alphin from effectively competing with him, the District Court made no findings as to whether such an intent brought into play the "bad faith—oppressive conduct" exception to the "American Rule" (that each party bear the cost of his own attorney) which was specifically recognized by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975).

Alphin appealed to the United States Court of Appeals for the Fourth Circuit, limiting his appeal to the ruling of the District Court regarding the award of a reasonable attorney's fee. In an opinion dated May 17, 1976, the Court of Appeals affirmed, citing dictum in the case of *Byram Concretetanks, Inc.* v. *Warren Concrete Products Co. of N.J.*, 374 F.2d 649 (3d Cir. 1967), for the conclusion that "[t]he failure of the plaintiffs to

[2] Alphin's Complaint in this case (Appendix B, *infra.*) sought treble damages and a "permanent injunction against the threatened loss and damage by defendants' violation of the antitrust laws." The injunctive relief entered by the Court (Appendix C, *infra.*) did precisely that.

prevail upon their claim for damages *precluded* any recovery for attorneys' fees under Section 4. . . ." (emphasis added), and ruling that this Court's opinion in *Alyeska, supra, "foreclosed"* (emphasis added) the award of an attorney's fee under the "bad faith—oppressive conduct" exception to the "American Rule."

After his Petition for Rehearing was denied on June 15, 1976, Alphin immediately moved to stay the issuance of the Court of Appeals' Mandate, stating his intention to seek a Writ of Certiorari from the Supreme Court. In response to Alphin's Motion, the Court of Appeals entered, on June 25, 1976, an Order staying the issuance of its mandate "pending application of the appellant in the Supreme Court of the United States for a Writ of Certiorari to this Court, provided the application is filed within the time permitted by law." (Appendix D, *infra.*).

On August 16, 1976, within the time permitted by law, Alphin filed a Petition for Writ of Certiorari to which a Supplement was filed on October 28, 1976. The Supplement brought to the attention of this Court the enactment, on September 30, 1976, of Public Law 94-435, known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This Court denied the Petition without comment on November 15, 1976, and on the same day Alphin served a "Motion for Leave to File a Petition for Rehearing" and a "Motion for Stay of Mandate" pending consideration of the aforesaid "Motion for Leave to File a Petition for Rehearing."[3]

On November 19, 1976 the Court of Appeals granted the motion for a further stay of its mandate "until the petition for rehearing is decided" and gave Henson full opportunity to file a response to the petition and to brief the issues raised therein. Henson availed himself of this opportunity and his response was filed on November 24, 1976.

[3] The Court of Appeals received formal notice of the denial of Alphin's Petition for a Writ of Certiorari on November 22, 1976.

On February 22, 1977, the Court of Appeals granted Alphin leave to file the petition for rehearing and withdrew that portion of their prior opinion which affirmed the denial of attorney's fees. Instead, the Fourth Circuit reversed the District Court's judgment in that regard and remanded "the case with directions to grant appropriate attorney's fees in accordance with the 1976 Act." In a dissenting opinion, Judge Field argued that the Act could not be given retrospective application in that the Court's prior decision "had become a finality . . . four months prior to the effective date of the Amendment."[4]

Henson then filed a Petition for Rehearing *en banc* and a Motion for Stay of Mandate, both of which were denied by the Court of Appeals. The Court of Appeals thereafter issued its mandate to the District Court which was filed in the District Court on May 16, 1977.

ARGUMENT

Stripped to its relevant essentials,[5] the Petition seeks this Court's review of three aspects of these proceedings in the Court of Appeals: first, Henson claims that the Court of Appeals lacked *jurisdiction* to apply the H-S-R Act in this case, since it had already rendered one opinion; second, that even if the Court of Appeals did have jurisdiction over the case when it

[4] The text of the Court of Appeals' February 22, 1977 opinion has been reprinted in the Petition as Appendix C and the Court's April 5, 1977 Order modifying that opinion was reprinted in the Petition as Appendix D. Subsequent to the filing of the Petition, on May 20, 1977, the Court issued an Order correcting a typographical error in its April 5 Order. This cleared up the confusion expressed by Henson in the Petition (at pp. 6-7). To simplify matters, we have corrected the February 22 opinion in the manner specified by the two subsequent Orders and have reprinted it, as corrected, at Appendix E, *infra*.

[5] Except to note that Henson's statement that "the trial court expressly found that the subject private antitrust action was brought solely in quest of an attorney's fee" (Pet. p. 2) is absolutely false (the trial court made *no* such "finding"), we shall not directly address the gratuitous insults of this nature found in Henson's Petition.

issued its February 22, 1977 opinion, the *Bradley* v. *Richmond School Board, supra,* doctrine was not applicable since its operation resulted, according to Henson, in "manifest injustice" to himself; and, third, that even if the *Bradley* doctrine was properly relied upon by the Court of Appeals, the H-S-R Act itself was misapplied by the Court since, according to Henson, the Court was wrong when it ruled that Alphin was "clearly" entitled to an attorney's fee under the H-S-R Act. None of these issues are substantial enough to warrant review by this Court.

I. The Jurisdiction of the Court of Appeals over this Case Was Not Lost When it Rendered its First Opinion

That an appellate court has the power to modify or change an opinion until its mandate issues, and in exceptional cases, even by recalling its mandate after it issues, is plain. Rehearings, rehearings *en banc*, and other proceedings which may modify, reverse or clarify a previously rendered appellate decision, while not common, are surely not extraordinary. Henson, however, argues that the Court of Appeals, having once rendered an opinion, is "precluded" from changing that opinion in light of legislation which became effective after that opinion was rendered. The logical result of this theory would be that if the H-S-R Act had become effective on the day after the Court's first opinion was entered, May 17, 1976, the Court of Appeals would have had no power to give effect to the new law in any subsequent, revised or modified opinion on rehearing. What Henson fails to recognize is that the February 22, 1977 opinion of the Court *was* a "decision" and, by giving full effect to the Act, followed precisely the doctrine enunciated in *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801) and followed in *Bradley, supra, i.e.*, that any "decision" by an Appellate Court must apply existing legislation "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley, supra* at p. 711. This is not a proposition that needs to be reiterated again by this Court in this case.

At the bottom of Henson's complaint in this regard is simply the fact that the mandate of the Court of Appeals had not yet issued at the time the Court received Alphin's second Petition for Rehearing. Henson claims that on two occasions the Court of Appeals "ignored" Rule 41(b) of the Federal Rules of Appellate Procedure by the Stays of Mandate issued on June 25, 1976 and November 19, 1976 and that, since the Federal Rules of Appellate Procedure are "obligatory and must be literally followed", the decision of the Court of Appeals must be reversed by this Court. In response, we respectfully direct the Court's attention to Rule 2 of the Federal Rules of Appellate Procedure:

> Rule 2. *Suspension of Rules.*
> In the interest of expediting decision, or for other good cause shown, a Court of Appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction (Fed.R.App.P. 2).[6]

It is obvious that the Court of Appeals acted within its legitimate powers by staying the issuance of its mandate as it did.

Indeed, this Court's opinion in the *Bradley* case clearly separated cases of this sort into two categories: on the one hand are cases where a new statute becomes effective *before* a "final judgment," and, on the other hand, are cases where a collateral

[6] Rule 26(b) specifically permits enlargements of time to be granted by a Court of Appeals *except* for five types of actions specifically described therein, but not including a Stay of Mandate. Moreover, it ill becomes Henson to castigate the Court of Appeals for its actions in this regard when Henson *never raised any objection* to Alphin's Motions for the Stays of Mandate nor to the stays as issued by the Court until after the Court's ruling went against Henson. It is also interesting to note that, while decrying the action of the Court of Appeals in granting Alphin a stay of mandate for more than 30 days (Pet. p. 15), Henson himself, on April 7, 1977, moved for a stay of mandate "for *at least* thirty days."

attack based upon new legislation is made upon a case *after* final judgment. *Bradley, supra*, at 710-11. The instant case, like *Bradley*, falls into the first category. When does "final judgment" occur? The *Bradley* opinion expressly ruled at p. 711 n.14: "By final judgment we mean one where the 'availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." On September 30, 1976 this case had *not* reached "final judgment" by that standard.

II. The Decision of the Court of Appeals Applied the Tests for "Manifest Injustice" and Arrived at a Conclusion Consistent With Decisions of this Court

The Court of Appeals cited *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974)[7] for the general rule that courts are to give effect to new laws in cases pending before them unless "manifest injustice" would result or unless the legislative history indicated to the contrary.[8]

In determining "manifest injustice," this Court in *Bradley* looked to adverse effects upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights before allowing retrospective application of a statute. The Fourth Circuit, in a concise fashion, considered all of these criteria in turn and found that such application was in order.

With regard to the nature and identity of the parties, this Court in *United States* v. *Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801) declared that in "mere private cases" the courts should struggle against retrospective operation of statutes. In *Bradley*, "mere private cases" were found not to include those suits brought to vindicate "a national policy of

[7] The *Bradley* case involved an award of attorney's fees pursuant to a statute enacted after the attorneys' services were rendered and after the case was submitted on appeal.

[8] The legislative history of the H-S-R Act so plainly and forcefully indicates that Congress *intended* it to be applied to pending cases that we need not review that history here and simply refer this Court to the discussion of that point in the opinion of the Court of Appeals.

high priority" or having to do with "great national concerns," 416 U.S. at 719 n.27. Antitrust enforcement is clearly such a "great national concern."

It is generally held that strong private enforcement of the antitrust laws is of great importance both to injured parties and to the nation as a whole. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Radovich* v. *National Football League*, 353 U.S. 445 (1957). In *United States* v. *Topco Associates*, 405 U.S. 596, 610 (1972), the antitrust laws were described as follows:

> They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

The market involved here is small, and the parties are not listed on the Big Board, but the Congressional purpose has been achieved nevertheless by a successful prosecution which resulted in a finding that the Sherman Act had been violated and an injunction issued against future violations. The Court of Appeals took cognizance of the importance of the nature of Alphin's suit by characterizing it as a vindication of "the public interest and public policy expressed in the antitrust laws." Clearly this is more than a "mere private case"; it is a successful attempt to compel greater competition between Henson and all those adversely affected by Henson's illegal attempt to monopolize.

Bradley's second test, that of the "nature of [the parties'] rights" turned upon whether retrospective application would "infringe any rights . . . which had matured or become unconditional." Looking at the effect upon Henson, the Court of Appeals expressly held that no such matured or unconditional rights would be affected and, in his Petition, Henson does not claim otherwise.[9]

[9] Strangely, the discussion of this point in the Petition focuses upon whether *Alphin* had any "rights" that were affected by retrospective application of the H-S-R Act. (Pet. at p. 12).

The third concern, under the *Bradley* decision, deals with the affected party having had "notice and opportunity to be heard," 416 U.S. at 720. The retrospective application of the H-S-R Act was briefed by Alphin both in the Supplement to his Petition for Writ of Certiorari and in his Petition for Rehearing. Although Henson chose not to file a response to Alphin's Supplemental Petition, Henson did brief the H-S-R Act in his response in opposition to Alphin's Petition for Rehearing. In fact, Henson devoted over half of his own Petition for Rehearing to an argument on the inapplicability of the H-S-R Act.[10] It is difficult for us to comprehend how Henson can now argue that he has not been given adequate opportunity to be heard. Additionally, as the Court of Appeals pointed out, since attorney's fees have been the only issue throughout this appeal, "lack of notice" is a frivolous argument.

Therefore, contrary to Henson's assertions, the Court of Appeals correctly applied the tests for "manifest injustice" from *Bradley* and appropriately determined that it did not exist in this case.

III. The Decision of the Court of Appeals Evidenced Due Regard for the "Substantially Prevailed" Requirement in the H-S-R Act

As enacted, the H-S-R Act amends Section 16 of the Clayton Act, 15 U.S.C. § 26, as follows:

> In any action *under this section* in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such plaintiff. (emphasis added.)

In his Petition, Henson has accused the Court of Appeals of making "no finding as to which party substantially prevailed" in the District Court and therefore asks this Court to remand the case for a "direct finding" on that issue. To the

[10] The Court of Appeals denied Henson's Petition for Rehearing on April 5, 1977.

contrary, the Court of Appeals affirmatively found that Alphin "clearly would have been entitled to an award of attorneys' fees supplementing the injunctive relief which [was] granted." It is submitted that this conclusion is the "finding" that has eluded Henson.

In support of the Court of Appeals' conclusion, it is useful to look at the injunctive relief that Alphin requested in his Complaint and the injunctive relief granted by the District Court. The Complaint prayed for a "permanent injunction against the threatened loss and damage by defendant's violation of the antitrust laws." On April 7, 1975, the District Court entered its judgment granting Alphin an injuction against Henson which

> . . . restrained and enjoined [Henson] from attempting to monopolize any part of the business they or either of them now conduct on the Hagerstown Regional Airport under their existing lease by negotiating on behalf of the City of Hagerstown, as airport manager or otherwise, or by using the position of airport manager in an effort to prevent others from establishing competitive operations, or *in any other way that would violate § 2 of the Sherman Act, 15 U.S.C. 2.* (emphasis added.)

By any manner of comparison, viewing the relief granted against the relief requested "clearly" indicates that Alphin has "substantially prevailed" in his suit for injunctive relief under Section 16 of the Clayton Act. It is obvious that a wide range of anticompetitive behavior on Henson's part, beyond acting as negotiator, was enjoined by the Court. In fact, any behavior by Henson in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, renders Henson subject to civil contempt of court proceedings and we fail to see what a remand to the District Court for a "direct finding" could accomplish.[11]

[11] At p. 12 of the Petition, Henson says that the District Judge "would not" have granted any injunctive relief to Alphin had he known that it would cause an attorney's fee to be awarded to Alphin. We cannot believe that a Federal District Court would refuse to enjoin unlawful conduct just because an attorney's fee would result.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents.

APPENDIX

APPENDIX A. Order dated May 20, 1977 of Court of Appeals Modifying Opinion dated February 22, 1977

APPENDIX B. Complaint

APPENDIX C. Injunction Entered by District Court dated April 7, 1975

APPENDIX D. Order of Court of Appeals Staying Mandate dated June 25, 1976

APPENDIX E. Corrected Opinion of Court of Appeals dated February 22, 1977

APPENDIX A

United States Court of Appeals

FOURTH CIRCUIT

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TENTH AND MAIN STREETS
RICHMOND, VIRGINIA 23219

May 20, 1977

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Hagerstown, MD 21740

Re: No. 75-1635, T. S. Alphin, etc. vs. Richard Henson, et al
(C/A 73-449-T)

Gentlemen:

Enclosed is a certified copy of the order of April 5, 1977 which contains one correction in line three of the second paragraph. Page 7 has been changed to page 4.

Sincerely yours,

WILLIAM K. SLATE, II

By CAROL R. LEMON

(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL/cfw

Enclosure

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1635

T.S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Appellants,

v.

RICHARD HENSON AND HENSON AVIATION, INC., AND CITY OF HAGERSTOWN, MARYLAND,
Appellees.

ORDER

Richard Henson and Henson Aviation, Inc. have joined in a petition for rehearing with a suggestion for rehearing in banc. The petition has been read and considered. A majority of the panel has voted to deny rehearing. Upon a request for a poll on the suggestion for rehearing in banc, a majority of the judges eligible to vote have voted to deny rehearing in banc.

It is, therefore, ORDERED that the petition for rehearing be, and it is hereby, denied. It is further ORDERED that the last sentence beginning on page 4 of the text of the slip opinion be stricken and the following inserted in lieu thereof: "Although it has been found that plaintiffs were among those adversely affected by defendants' illegal attempt to monopolize, plaintiffs have been denied any recovery for damages."

For the Court:

HARRISON L. WINTER

Harrison L. Winter,
United States Circuit Judge

A True Copy Teste,
William K. Slate, II, Clerk

By C. F. WILLIAMS
Deputy Clerk

APPENDIX B

United States District Court

FOR THE DISTRICT OF MARYLAND

T. S. ALPHIN, d/b/a ALPHIN AIRCRAFT
Plaintiff
v.
RICHARD HENSON
HENSON AVIATION, INC.
Defendants

Civil Action No. 73-449-T

COMPLAINT

1. Plaintiff is T. S. Alphin, d/b/a Alphin Aircraft, 2613 Pennsylvania Avenue, Hagerstown, Maryland.

2. Defendant Richard A. Henson resides in Hagerstown, Maryland. Defendant Henson Aviation, Inc. is doing business at Hagerstown Municipal Airport, Hagerstown, Maryland.

3. This is an action arising under the antitrust laws, 15 U.S.C. 2, 15 U.S.C. 15 and 15 U.S.C. 26. This court has jurisdiction under 28 U.S.C. 1337 and has venue under 28 U.S.C. 1391.

4. Defendants have monopolized, attempted to monopolize and conspired with each other and with other persons to monopolize trade and commerce in supplying and servicing aviation products and services in interstate commerce at Hagerstown Municipal Airport, Hagerstown, Maryland.

5. Defendants have unlawfully controlled entry of competitive enterprises on and at the Hagerstown Municipal Airport and set prices for services on the said airport.

6. Defendants have unlawfully required plaintiff to pay and collect fees and charges on a different and more onerous basis than defendants charge and collect fees and charges for services rendered to customers on and at said airport to the great competitive disadvantage of plaintiff.

7. Defendants have excluded, and are excluding, enterprises, including plaintiff's, from competing with the services rendered by defendants. Defendants have refused and are refusing to permit plaintiff to engage in business activities in competition with defendants' business activities on the said airport.

8. Defendants have demanded of plaintiff onerous and discriminatory fees and charges which place an unreasonable burden on plaintiff's ability to do business on and at the said airport.

9. Defendants have threatened and are threatening to close off plaintiff's access to said airport and thereby deny plaintiff's customers access to the facilities of plaintiff located adjacent to said airport, which has caused and is causing, and will in the immediate future cause plaintiff great and irreparable damage and loss.

10. Within the past four years, the unlawful activities of defendants and each of them have damaged plaintiff in the amount of $400,000.

11. The unlawful conduct of defendants and each of them, in violation of the antitrust laws, threaten irreparable loss and damage to plaintiff.

Plaintiff prays:

(a) For threefold the damages sustained by plaintiff, and the cost of suit, including a reasonable attorney's fee.

(b) For a preliminary and permanent injunction against the threatened loss and damage by defendants' violation of the antitrust laws.

(c) For such other relief as may be appropriate.

Respectfully submitted

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Of Counsel

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APPENDIX C

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

T. S. ALPHIN and ALPHIN AIRCRAFT, INC. v. RICHARD HENSON and HENSON AVIATION, INC. and CITY OF HAGERSTOWN, MARYLAND	CIVIL NO. 73-449-T

JUDGMENT

The Court having heard the evidence and argument of the parties and having issued findings and conclusions in an opinion dated March 14, 1975, hereby enters judgment this 7th of April, 1975, as follows:

1. Based upon Conclusions 1 through 8 in that opinion, which are made a part of this judgment,

A. The defendants, Richard Henson and Henson Aviation, Inc., are hereby restrained and enjoined from attempting to monopolize any part of the business they or either of them now conduct on the Hagerstown Regional Airport under their existing lease, by negotiating on behalf

of the City of Hagerstown, as airport manager or otherwise, or by using the position of airport manager in an effort to prevent others from establishing competitive operations, or in any other way that would violate § 2 of the Sherman Act, 15 U.S.C. 2.

B. The defendant, City of Hagerstown, and its officials are hereby restrained and enjoined from permitting Richard Henson or Henson Aviation, Inc., to negotiate on behalf of the City with persons seeking leases or contracts permitting them to engage in activities on the Hagerstown Regional Airport which would compete with those engaged in by Richard Henson, Henson Aviation, Inc., or any other corporation in which Richard Henson is an officer or a stockholder.

2. The claim of plaintiffs, T. S. Alphin and Alphin Aircraft, Inc., for damages against defendants Richard Henson and Henson Aviation, Inc., is denied.

3. The claim of plaintiffs, T. S. Alphin and Alphin Aircraft, Inc., for attorney's fees is denied.

4. Judgment is entered in favor of the counterclaim defendants, T. S. Alphin and Alphin Aircrafts, Inc., on the counterclaims filed by the counterclaim plaintiffs, Richard Henson and Henson Aviation, Inc.

5. Plaintiffs, T. S. Alphin and Alphin Aircraft, Inc., shall recover their taxable costs against Richard Henson and Henson Aviation, Inc. The amount of such costs shall be determined by further order of this Court, if the parties are unable to agree.

6. Richard Henson, Henson Aviation, Inc., and the City of Hagerstown shall each bear his or its own costs.

/s/ ROSZEL C. THOMSEN

Senior United States District Judge

APPENDIX D

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1635

T. S. Alphin, d/b/a Alphin Aircraft,

Appellants,

versus

Richard Henson and Henson Aviation, Inc.,

Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore

Upon motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

A True Copy, Teste:

William K. Slate, II, Clerk

By /s/ E. BEETON

Deputy Clerk

For the Court—by Direction

/s/ WILLIAM K. SLATE, II

CLERK

APPENDIX E

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1635

T. S. Alphin and Alphin Aircraft, Inc.,
Appellants,

v.

Richard Henson and Henson Aviation, Inc.,
and City of Hagerstown, Maryland,
Appellees.

On Petition for Rehearing.

Submitted November 24, 1976. Decided February 22, 1977.

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and MERHIGE,* District Judge.

Carl W. Schwarz, (Metzger, Noble, Schwarz and Kempler; Robert M. Beckman, Frank Kingston Smith; Beckman and Smith on brief) for Appellants; George J. Goldsborough, Jr., and (Broughton M. Earnest on brief) for Appellees Richard Henson and Henson Aviation, Inc.; (Robert E. Kuczynski, Daniel W. Moylan and William P. Nairn on brief) for Appellee The City of Hagerstown.

* Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

In a previous appeal we affirmed the district court's ruling that defendants, Richard Henson and Henson Aviation, Inc., had attempted to monopolize the business they conducted at the Hagerstown (Maryland) Regional Airport in violation of § 2 of the Sherman Act and that plaintiffs were entitled to injunctive relief. Because plaintiffs could not prove damages as a result of these defendants' attempt to monopolize, we affirmed the district court's ruling that on the authority of *Byram Concretanks, Inc.* v. *Warren Concrete Prod. Co. of N.J.*, 374 F.2d 649, 651 (3 Cir. 1967), plaintiffs could not recover attorneys' fees from these defendants pursuant to § 4 of the Act. Our opinion is reported in 538 F.2d 85 (4 Cir. 1976).

By order entered June 25, 1976, we stayed the issuance of our mandate to permit plaintiffs to apply for a writ of certiorari from the Supreme Court. The petition was filed in the Supreme Court on August 16, 1976. It was eventually denied on November 15, 1976. Notice of denial was received by us on November 22, 1976. In the interim, plaintiffs, on November 17, 1976, filed a motion for leave to file a second petition for rehearing. We entered a further stay of our mandate on November 19, 1976 until the matter could be decided, and directed Henson and Henson Aviation, Inc. to file an answer thereto. The answer was filed on November 24, 1976, and the matter is ripe for decision.

Plaintiffs' latest motion calls attention to the enactment of Public Law 94-435, known as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976," which, *inter alia*, added to the language of 15 U.S.C. § 26 the following:

> In any action under this section in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such plaintiff.

The Act was signed by the President on September 30, 1976, and the quoted language became effective on that date.

The significance of the amendment to the plaintiffs is at once apparent when it is recognized that the injunction against these defendants was entered pursuant to the authority vested in the district court by 15 U.S.C. § 26.[1] Thus, had the 1976 amendment been in effect at the time of decision by the district court, plaintiffs clearly would have been entitled to an award of attorneys' fees supplementing the injunctive relief which they were granted.

It is an established principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974).[2] In the instant case, we do not think that an award of attorneys' fees would result in manifest injustice. Plaintiffs, small aircraft maintenance and repair operators, have successfully vindicated the public interest and public policy expressed in the antitrust laws by bringing would-be monopolists to heel. Although it has been found that plaintiffs were among those adversely affected by defendants' illegal attempt to monopolize,* plaintiffs have been denied any recovery for damages. Retrospective application of the 1976 Act would not, in our view, infringe any right of defendants which had matured or become unconditional; nor have defendants been denied the opportunity to be heard. Indeed, the subject of plaintiffs' claim to attorneys' fees has been the subject of litigation throughout. *See Bradley* v. *Richmond School Board*, 416 U.S. at 717-21. Finally, the 1976 Act, so far as

---

[1] While the antitrust violation which defendants committed was an attempt to monopolize proscribed by § 2 of the Sherman Act, 15 U.S.C. § 2, § 16 of the Clayton Act, 15 U.S.C. § 26, is the statute empowering a court of the United States to grant injunctive relief against threatened loss or damage by a violation of the "antitrust laws." "Antitrust laws" is defined by § 1 of the Clayton Act, 15 U.S.C. § 12, to include the Sherman Act.

[2] It is of special interest that Bradley was a case involving an award of attorneys' fees pursuant to a statute enacted after the attorneys' services were rendered and after the case was submitted, but not yet decided, on appeal. The statute was held applicable and counsel fees ordered to be awarded.

[* Per order filed April 5, 1977.]

pertinent, contains no limitation prohibiting its application to the present suit. The legislative history of the 1976 Act indicates that it was intended to apply.[3]

Our control over a judgment of our court continues until our mandate has issued, *Gradsky* v. *United States*, 376 F.2d 993 (5 Cir. 1967); *Meredith* v. *Fair*, 306 F.2d 374 (5 Cir. 1962), unless, of course, our control has been ousted by proceedings in the Supreme Court. Indeed, in exceptional cases, we may even recall our mandate to avoid injustice. *Perkins* v. *Standard Oil Co. of California*, 487 F.2d 672 (9 Cir. 1973); *Powers* v. *Bethlehem Steel Corp.*, 483 F.2d 963 (1 Cir. 1973).

In the instant case, our mandate has not issued as a result of successive stays. We disagree with defendants that Rule 41(b), F.R.A.P., required that our mandate issue on November 15, 1976, the date that the Supreme Court denied certiorari. Read in the full context of Rule 41(b),[4] we think that the

[3] During the Senate debates, Senator Abourezk asked Senator Hart (the moving force behind the legislation):

> Does this mean that following the usual rule, as in such cases as *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), actions brought prior to the date of enactment of this provision, yet decided after the date of enactment, will still be eligible for such attorneys' fees awards?
>
> MR. PHILIP A. HART. The answer is "yes," under that case and a number of other comparable cases.

Cong. Rec. S8960 (daily ed. June 10, 1976) (94th Cong., 2d Sess.)

[4] With emphasis supplied to the sentence relied on by plaintiffs, Rule 41(b) reads:

> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. *Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.* A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

"filing of a copy of an order of the Supreme Court, etc." refers to the filing in our court and not the original filing in the Supreme Court.[5] While the filing in our court occurred on November 22, 1976, we had already stayed issuance of our mandate by order filed November 19, 1976.

Thus, we conclude that our decision is not final and that we should amend what we previously decided to make it conform to the law which now exists.[6] We therefore grant leave to file the second petition for rehearing; we grant the petition for rehearing; and we withdraw the portion of our prior opinion affirming the denial of attorneys' fees. Instead, we reverse that portion of the district court's judgment and remand the case with directions to grant appropriate attorneys' fees in accordance with the 1976 Act. So that the case is not unduly fragmented, the district court shall make an allowance for attorneys' fees for services in this court and in the Supreme Court, as well as for services in the district court. Plaintiffs shall recover costs since they have ultimately prevailed on appellate review.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

[5] Rule 1, F.R.A.P., states that the rules govern procedures in the United States Courts of Appeals. Since the Supreme Court does not issue a mandate when certiorari is denied, the issuance of the mandate is by a Court of Appeals. This indicates that the filing is with the court issuing the mandate. Additionally, the filing in the Supreme Court would not be of a "copy"; it would be the original order denying certiorari.

[6] Defendants contend that plaintiffs sought to bring the 1976 Act to the attention of the Supreme Court and that since the Supreme Court denied certiorari, it necessarily rejected the argument that the 1976 Act was applicable. We are not persuaded. The law is clear that the denial of certiorari decides nothing except that the writ will not be granted for reasons which are undisclosed.

FIELD, Senior Circuit Judge, dissenting:

As noted by the majority, in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), the Court stated "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." On May 17, 1976, we did just that when we filed our opinion in this case denying an award of attorneys' fees.[1] Thereafter we stayed our mandate to permit the plaintiffs to apply for a writ of certiorari, and on September 30, 1976, and while the petition for certiorari was pending, Public Law 94-435, amending 15 U.S.C. § 26, became effective. Certiorari was denied by the Supreme Court on November 15, 1976.

The majority, drawing primarily on *Bradley*, concludes that since our mandate had not issued[2] our decision in this case is not final and that we should therefore give the plaintiffs the benefit of the Amendment. In my opinion the rationale of *Bradley* is inapplicable to this case. In *Bradley* the statute had become effective while the case was pending in this court and had not yet been decided. In the present case, however, the case had been decided by us and had become a finality in this court over four months prior to the effective date of the Amendment. While I agree, of course, that the denial of certiorari has little or no decisional or precedential effect, nevertheless, it occurs to me that the Supreme Court would have been as perceptive as we in discerning any effect of the Amendment on this case. In my opinion the majority has intruded upon the legislative area in giving the Amendment retroactive effect.

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[1] *Alphin* v. *Henson*, 528 F.2d 85 (4 Cir. 1976).

[2] Rule 41(b), Fed.R.App.P., provides, *inter alia*, that "[u]pon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately." Since our mandate was initially stayed for the limited purpose of permitting the plaintiffs to file their petition for certiorari, I entertain serious doubts that our action in ordering a further stay after certiorari had been denied was consonant with Rule 41(b).